STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☒ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Adele Shanklin,
Petitioner,

vs.

No: 11 WC 01267
12 WC 39898

14IWCC0271

Belleville Shoe Company,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under Section 19(b) of the Act having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, and effect of prior settlement, and being advised of the facts and law, clarifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

At hearing, Petitioner's attorney stated that claim 11 WC 001267 was filed for the same injury as 12 WC 39898 but was missing a date of accident upon initial filing. The 12 WC 39898 claim was intended to be a correction of the 11 WC 01267 application, but a new claim number was assigned. Both claims allege an injury on September 20, 2010 and were consolidated for hearing on November 29, 2012. A single arbitration decision was issued for both claims on December 31, 2012.

After considering the entire record, the Commission clarifies the Decision of the Arbitrator and otherwise affirms and adopts the Decision of the Arbitrator for the reasons set forth below.

14IWCC0271

Arbitrator Granada found in his December 31, 2012 decision that Petitioner failed to prove that she sustained an accidental injury on September 20, 2010. Petitioner testified at hearing that she was working at Respondent's factory on September 20, 2010 trimming boots coming off the line when something popped and caused pain in her left shoulder and she experienced additional pain in her right hand and left elbow. Petitioner further testified that she did not notice any gradual onset of symptoms in the months leading up to September 20, 2010 and that she did not report her complaints until after she received payment for prior workers' compensation claims which had been recently settled. The arbitrator noted Dr. Brown's treatment record of November 8, 2010 stated Petitioner reported recurrent numbness in her right hand and left little finger which she had been experiencing for the past three to four months, and she had no specific injury that she could recall. Petitioner also treated with Dr. Miller on November 8, 2010, and his record indicates that Petitioner gave a history of bilateral shoulder pain, left greater than right, for a six month period with escalation of her symptoms beginning in September and no specific injury was noted. The Arbitrator found Petitioner's testimony that she sustained a specific injury on September 20, 2010 disingenuous and not credible. The evidence did not support an accidental injury on that date, and the medical records in evidence indicate symptoms for several months before November 2010 without specific injury. The Commission agrees and affirms and adopts the Arbitrator's finding that Petitioner did not sustain an accident that arose out of and in the course of employment on September 20, 2010.

Prior to the current claims at issue here, Petitioner filed Applications for Adjustment of Claim which were assigned case numbers 09 WC 19807 and 09 WC 8806 for injuries allegedly sustained in the scope and course of employment for Respondent on August 1, 2008 and December 3, 2008. In both prior claims, Petitioner alleged injury to her bilateral hands, wrists, elbows, arms and body as a whole. A consolidated settlement on claims 09 WC 8006 and 09 WC 19087 was approved on August 24, 2010 by an arbitrator for alleged injuries to the bilateral hands and arms, right leg, back, spine and body as a whole. The terms stated the agreement represented the full and final settlement of all claims from the alleged accidents of August 1, 2008 and December 3, 2008 and any aggravating incidents, accidents or exacerbations to date. The parties agreed at hearing that the settlement contract approved on August 24, 2010 was intended to compensate Petitioner for any injuries suffered through the date of approval. Arbitrator Granada found that, based on the history Petitioner relayed to her treating physicians for the September 20, 2010 claim, her hand, arm and shoulder complaints began three to six months prior to November 8, 2010, and Petitioner admitted at hearing that she waited to seek treatment for her complaints until after she received payment for the settlement approved on August 24, 2010. Therefore, the Arbitrator found that Petitioner's claims 11 WC 001267 and 12 WC 39898 to her upper extremities was barred by the August 24, 2010 settlement contract.

The Commission clarifies the Arbitrator's finding with regard to the bar of claims 11 WC 1267 and 12 WC 39898 due to the prior settlement approved August 24, 2010 for claims 09 WC 19087 and 09 WC 8006. The Arbitrator found Petitioner failed to prove she sustained an accident in the scope and course of employment on September 20, 2010. The Arbitrator stated in his decision that based on the history Petitioner gave her treating physicians, her hand, arm and shoulder problems actually began three to six months prior to November 8, 2010. Respondent argues, and the Commission agrees, that the Arbitrator was stating that the August 24, 2010 settlement contract would bar a claim for injuries three to six months prior to November 8, 2010 if the Commission were to modify the alleged accident/manifestation date to conform to the credible medical records in evidence. If the Commission were to modify the alleged accident

date to conform to the credible evidence, the accident date would fall in the period of May 8 to August 8, 2010. This is squarely in the time period in the terms of settlement approved on August 24, 2010 covering any aggravating incidents, accidents or exacerbations Petitioner might suffer. The Commission finds that had the accident or manifestation date been modified to conform to the credible evidence in the record, the Petitioner's claims 11 WC 1267 and 12 WC 39898 would be barred by the terms of settlement for claims 09 WC 19087 and 09 WC 8006.

All else is otherwise affirmed and adopted. Claims denied.

IT IS THEREFORE ORDERED BY THE COMMISSION that the December 31, 2012 Decision of the Arbitrator is hereby clarified and otherwise affirmed or adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 11 2014

Daniel R. Donohoo

Kevin W. Lamborn

Thomas J. Tyrrell

drd/adc
o-10/29/13
68

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SHANKLIN, ADELE
Employee/Petitioner

Case# **11WC001267**

12WC039898

BELLEVILLE SHOE MANUFACTURING CO
Employer/Respondent

14IWCC0271

On 12/31/2012, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.13% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2424 SAUTER SULLIVAN LLC
MICHAEL KNEPPER
3415 HAMPTON AVE
ST LOUIS, MO 63139

0180 EVANS & DIXON LLC
MARILYN C PHILLIPS
211 N BROADWAY SUITE 2500
ST LOUIS, MO 63102

STATE OF ILLINOIS)
)SS.
COUNTY OF MADISON)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Adele Shanklin
Employee/Petitioner

Case # 11 WC 1267

v.

Consolidated cases: 12 WC 39898

Belleville Shoe Manufacturing Co.
Employer/Respondent

14IWCC0271

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Granada**, Arbitrator of the Commission, in the city of **Collinsville**, on **November 29, 2012**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☒ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Whether prior settlement bars this claim.**

FINDINGS 14IWCC0271

On 9/20/10, Respondent was operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner did not sustain an accident that arose out of and in the course of employment.

Timely notice of this accident was given to Respondent.

Petitioner's current condition of ill-being is not causally related to the accident.

In the year preceding the injury, Petitioner earned $18,862.35; the average weekly wage was $400.01.

On the date of accident, Petitioner was 53 years of age, single with 0 dependent children.

Petitioner has received all reasonable and necessary medical services.

Respondent has paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $0 for TTD, $0 for TPD, $0 for maintenance, and $0 for other benefits, for a total credit of $0.

Respondent is entitled to a credit of $0 under Section 8(j) of the Act.

ORDER

The Arbitrator finds petitioner failed to prove she sustained an accident arising out of and in the course of her employment on September 20, 2010.

The Arbitrator finds this claim is barred by petitioner's settlement contract regarding 09 WC 8006 and 09 WC 19087.

No benefits are awarded. These claims are denied.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

12/20/12
Date

DEC 31 2012

Findings of Fact

Petitioner was hired by respondent on May 20, 2008. She testified that her job as a rubber trimmer required her to trim excess rubber off boot soles using a chest level trimming wheel machine and pliers. She sustained injuries to her hands, wrists, elbows, arms and body as a whole due to repetitive trauma with a manifestation date of August 1, 2008 (09 WC 19087). On December 3, 2008, Petitioner slipped and fell sustaining injuries to her back, spine, right knee, and body as a whole (09 WC 8006). Resp. Exs. 1 & 2.

On October 9, 2009, Petitioner underwent a right ulnar nerve transposition. On October 30, 2009, she underwent left ulnar nerve transposition and carpal tunnel releases. These surgeries were performed by Dr. Brown of The Orthopedic Center of St. Louis, to whom she had been referred by her attorney. On December 28, 2009, Dr. Brown released her from care to follow up as needed. Resp. Ex. 4.

Both 09 WC 8006 and 09 WC 19087 were settled at the same time by a settlement contract approved on August 24, 2010. The terms of that contract read as follows:

> Respondent to pay petitioner the sum of $23,848.54 representing 17.5% permanent partial disability to petitioner's right arm, 15% permanent partial disability to petitioner's left arm, 15% permanent partial disability to petitioner's left hand and .4% permanent partial disability to petitioner's body as a whole in full and final settlement of all claims resulting from the alleged incidents of on or about 08/01/08 and 12/03/08 ***and any aggravating incidents, accidents or exacerbations to date*** to be paid in a lump sum. Disputes include: (1) Accident; (2) Causation; (3) Nature and extent of disability; (4) Amount of temporary total disability benefits, if any, to which petitioner may be entitled; (5) Responsibility for any treatment expense that has been incurred or may be incurred in the future. Respondent disputes all unpaid treatment expense. It is the purpose of this contract to effect a final settlement without the right of either party to reopen this case under any provision of the Workers' Compensation Laws of Illinois, Missouri or any other jurisdiction except respondent waives no rights pursuant to Section 5(b) of the Illinois Workers' Compensation Act or any other subrogation interest. (*Emphasis added.*) Resp. Ex. 2.

At Arbitration on November 29, 2012, Petitioner testified that while at work trimming on September 20, 2010, something popped in her left shoulder. She complained of pain in her right wrist, left elbow, and left shoulder and claimed that she had no problems in the months preceding September 20, 2010. She admitted she did not report her current problems until she received the settlement payment for her two prior claims. After she received her money, she returned to Dr. Brown.

On November 8, 2010, Petitioner complained to Dr. Brown of having experienced recurrent numbness in her right hand and left little finger for the last three to four months. She could recall no specific traumatic injury. He ordered nerve conduction studies and allowed her to continue working full duty. Resp. Ex. 4; Pet. Ex. 2.

On November 8, 2010, Petitioner also saw Dr. Miller of The Orthopedic Center of St. Louis and reported a six month history of bilateral shoulder pain, left greater than right, with an escalation in September. Pet. Ex. 3, Personal Information Sheet; Pet. Ex. 6, 19. Her pain bothered her most with reaching, overhead movements. He found tenderness over the left biceps groove and posterior capsule. He also found left sided pain on active motion, and a catching on internal and external rotation. X-rays revealed bilateral AC joint degenerative joint

disease. His assessment was left shoulder; rule out rotator cuff tear, likely due to repetitive use. He allowed her to continue working and requested an MRI arthrogram. Pet. Ex. 3; Pet. Ex. 6, Depo. Ex. B. Dr. Miller testified that he spoke with Petitioner about any specific injuries and she did not report any one particular event, but rather described a gradual onset of bilateral shoulder symptoms, left worse than right. Pet. Ex. 6, 6-7.

On November 17, 2010, Petitioner saw Dr. Phillips. She told him that after her surgery she was better, but about four months later she had an exacerbation of the left medial elbow pain and a sudden onset of numbness in the fifth finger. Electrodiagnostic studies performed on that date revealed improved right ulnar and left median nerve studies consistent with decompression in the normal range. There was mild demyelinative median sensory neuropathy across the right carpal tunnel, slowing of the left ulnar motor conduction velocity across the elbow with a decrement in the ulnar sensory responses consistent with recurrent left ulnar neuropathy across the elbow. Dr. Phillips recorded no history of a specific injury. Pet. Ex. 4.

On November 17, 2010, Dr. Brown reviewed Petitioner's November 17, 2010 electrical studies and diagnosed recurrent left cubital tunnel syndrome and right carpal tunnel syndrome. He recommended surgery. Pet. Ex. 2.

On November 17, 2010, Petitioner underwent a left shoulder arthrogram which Dr. Wu, the radiologist, found revealed mild distal supraspinatus and infraspinatus tendinosis, no tendon rupture or retraction; acromioclavicular osteoarthritic disease; and, no discrete labral tear. Pet. Ex. 5.

When Petitioner saw Dr. Brown on December 1, 2010, she reported that her symptoms had not improved. He found tenderness on the transposed ulnar nerve at the left. Tinel's also induced some discomfort. She had positive Tinel's and direct compression test at the right carpal tunnel. His impression was recurrent left cubital tunnel syndrome and right carpal tunnel syndrome. He recommended surgical intervention, but allowed her to continue working full duty pending surgery. Pet. Ex. 2.

Petitioner also saw Dr. Miller on December 1, 2010. She described her job duties as pulling and tugging on rubber. The doctor noted: "She puts boots on a cutting machine. Evidently, she does 150 boots an hour." Dr. Miller assumed Petitioner had a history of several months of bilateral shoulder pain. She demonstrated a loss of strength and rotation left more than right, with a catch on internal and external rotation on the left. Petitioner told the doctor that the intraarticular cortisone injection performed at the same time as the MRI arthrogram did not help her symptoms. She complained of a great deal of biceps pain and anterior shoulder pain. His assessment was "Left shoulder: Rule out biceps tendon partial tear." He recommended a left shoulder diagnostic arthroscopy and biceps tenodesis. Pet. Ex. 3; Pet. Ex. 6, Depo. Ex. B.

Petitioner was evaluated by Dr. Mirkin at respondent's request on March 14, 2011. She told him that she began to develop pain in her left shoulder, elbows and hands on September 20, 2010 while performing her normal job of cutting. He noted she had undergone bilateral elbow surgery and a left carpal tunnel release in 2009. Petitioner said she had enjoyed post-operative improvement, but her symptoms recurred. Resp. Ex. 5, Depo. Ex. 2.

Petitioner complained to Dr. Mirkin of aches and pains over her entire body, and in particular in her shoulders, elbows and wrists. On physical examination he found she had full range of motion in her shoulders, mild tenderness in the anterior aspect of the left shoulder, a negative supraspinatus sign, a negative impingement

sign, negative Tinel's over both carpal tunnels, some tenderness over the left ulnar nerve and healed incisions on the left and right ulnar nerves. Her shoulder x-rays were normal. Resp. Ex. 5, Depo. Ex. 2.

Dr. Mirkin reported that Petitioner had developed recurrent cubital tunnel syndrome and carpal tunnel symptoms which were related to her prior injury in 2009, and were unrelated to any incident occurring on September 20, 2010. He also found mild left shoulder supraspinatus tendinitis. He found no indication for biceps tenodesis unless an abnormality could be confirmed on the MRI by a competent radiologist. He found Petitioner could work without restriction. Resp. Ex. 5, Depo. Ex. 2.

On May 16, 2011, Dr. Miller recommended a diagnostic arthroscopy. He explained that the likely intervention for an intrasubstance biceps tear was biceps tenodesis. He explained that biceps tendon pathology was typically related to repetitive pushing and pulling. He found a causal relationship between her job and the development of the biceps tendon problem. Pet. Ex. 6, Depo. Ex. B.

At Arbitration Petitioner complained of pain in her right wrist, left elbow, and left shoulder. She testified that she wanted to undergo the treatment recommended by Drs. Brown and Miller to relieve her pain. She was continuing to work without restriction.

Regarding the Disputed Issues the Arbitrator Finds as Follows:

1. Whether Petitioner sustained an accident at work on September 20, 2010.

The Arbitrator finds Petitioner failed to prove she sustained an accidental injury arising out of and in the course of her employment with respondent on September 20, 2010.

At Arbitration on direct examination Petitioner testified that on September 20, 2010: "I was trimming the boots, trimming the boots, and then something popped and that's when I reported it to my supervisor." She explained that the popping had been in her left shoulder, and at that time she also experienced pain in her right hand, and her left elbow. She testified that she did not notice a gradual onset of symptoms in the months leading up to September 20, 2010.

Dr. Brown's records indicate that on November 8, 2010, Petitioner reported experiencing recurrent numbness in her right hand and left little finger for the last three to four months, and that she could recall no specific traumatic injury. Resp. Ex. 4; Pet. Ex. 2. Petitioner admitted she told Dr. Brown she could recall no specific injury that caused her symptoms. She said she did not remember telling Dr. Brown her symptoms began three or four months earlier, but was confident the history in his report was accurate.

Petitioner testified that she told Dr. Miller she had suffered a specific incident at work with a popping in her shoulder. Dr. Miller's records indicate that on November 8, 2010, Petitioner gave a history of having experienced bilateral shoulder pain, left greater than right, for six months with an escalation in September. No specific injury was detailed in his records, or in the Personal Information form completed by Petitioner herself on that date. Pet. Ex. 3, Personal Information Sheet; Pet. Ex. 6, 19. Petitioner agreed that if Dr. Miller testified that the intake report said six months, he would have been accurate.

At Arbitration, Petitioner admitted that she did not report the problems of which she complained at trial until she received payment for her prior claim. She admitted that after she received her settlement check, she went to Dr. Brown with complaints of recurrent right hand numbness and numbness in her left little finger.

The Arbitrator finds Petitioner's testimony that she sustained a discrete injury on September 20, 2010 disingenuous, and not credible. The Arbitrator finds that although Petitioner claimed she sustained an accidental injury on September 20, 2010, no other evidence supports that allegation. To the contrary, Petitioner told both Dr. Miller and Dr. Brown she had been experiencing symptoms for several months before seeing them on November 8, 2010. She gave neither of them a history of problems beginning after an accident which occurred on September 20, 2010.

Based on the foregoing, the Arbitrator finds that Petitioner failed to prove she sustained an accidental injury arising out of and in the course of her employment by respondent on September 20, 2010.

2. Whether this claim is barred by the settlement contract for 09 WC 19087 and 09 WC 8006.

Petitioner in her prior claim, 09 WC 19087, alleged that she sustained serious and permanent injuries to her "Right and left hands, wrists, elbows, arms, and body as a whole." Resp. Ex. 1. That case was settled by contract signed by Petitioner on August 12, 2010 and approved on August 24, 2010. Resp. Ex. 2. The terms of the contract state that it was a "full and final settlement of all claims resulting from the alleged incidents of on or about 08/01/08 and 12/03/08 and any aggravating incidents, accidents or exacerbations to date."

In **Tyler v. Kane County** 2010 Ill. Wrk. Comp. LEXIS 58, a settlement contract approved on October 10, 2006 contained the following language: "for all accidental injuries allegedly incurred on 9/18/02 or any claim that Petitioner could bring for any injury as a result of employment with Respondent or for which the Respondent would provide coverage as described herein and any facts which could give rise to a claim up to the date of this settlement and including and all results, developments, or sequelae, fatal or nonfatal, resulting or allegedly resulting from such accidental injuries." That Petitioner subsequently filed another claim alleging an accident date of October 7, 2005. The Commission ordered the October 7, 2005 claim dismissed as it included a date of accident covered by the settlement language of the contract approved on October 10, 2006.

In **Powell v. Peoria Housing Authority**, 2010 Ill. Wrk. Comp. LEXIS 951, the Petitioner settled a March 21, 2006 claim with contracts approved on March 3, 2008. The language of that contract provided that the settlement "includes any aggravation of or a new injury to that part of the body injured in this specific occurrence which may have occurred prior to the date of this contract's approval." The Commission found Petitioner's claim for an accident occurring on June 18, 2007 was compromised by the terms of the contact approved on March 3, 2008.

The facts in the present case are similar to **Gibbons v. The American Coal Co.**, 12 IWCC 259, 2012 Ill. Wrk. Comp. LEXIS 246, where the Commission affirmed the Arbitrator's finding that Petitioner's claim for a July 13, 2009 injury was barred by the terms of a settlement contract approved on July 3, 2009. The contract recited that consideration was to be paid to Petitioner in exchange for full, final and complete settlement of all claims for injuries to both hands, the right arm and left arm arising out of Petitioner's employment by Respondent to the date that Petitioner signed the contract on June 17, 2009.

In **Gibbons**, on February 3, 2010, Petitioner gave his treating physician a history of shoulder pain dating back 13 months to January 2009. The Arbitrator found Petitioner's symptoms began in January 2009 and continued unabated thereafter. Therefore, the Arbitrator found the July 3, 2009 contract covered the accident date of January 7, 2009, as well as any claims involving Petitioner's hands and arms arising out of his employment with respondent to the date Petitioner signed the contract on June 17, 2009. The Arbitrator found the parties had intended to extinguish all pending or potential claims involving the hands and arms which were or might have been asserted as of June 17, 2009.

The Arbitrator finds that based upon the history Petitioner gave to her treating physicians, Dr. Brown and Dr. Miller, her hand, arm and shoulder problems of which she complained at Arbitration, began three to six months prior to November 8, 2010. Petitioner admitted that after she received payment for her prior claims she reported her current hand and arm problems, and sought medical treatment from Drs. Brown and Miller. The Arbitrator finds Petitioner's testimony that she sustained a discrete injury on September 20, 2010 disingenuous, and not credible.

The Arbitrator finds that the parties agreed the settlement contract approved on August 24, 2010 was to compensate Petitioner for any injuries suffered through that date. The Arbitrator finds Petitioner's present claim for injuries to her upper extremities barred by that contract.

Based on his findings regarding the issues of date of accident, and whether this claim is barred by a prior settlement contract, it is not necessary for the Arbitrator to reach the other issues.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
JEFFERSON

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☒ Reverse Accident	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Alex Moll,
Petitioner,

vs. 12 WC 42536

14IWCC0272

State of Illinois/Menard Correctional Center,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident and causal connection, and being advised of the facts and law, reverses the May 31, 2013 Section 19(b) decision of Arbitrator Gerald Granada as stated below. After considering the record as a whole, and for the reasons set forth below, the Commission finds that Petitioner proved that he suffered an accident in the course of and arising out of his employment as correctional officer and that his current condition of ill-being is causally related to that accident. The Commission remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980).

On November 26, 2012, Petitioner, a 28 year old gallery officer, lost his footing and fell down seven metal steps, striking his back and head. He testified that he walks up the steps six to ten times a day during the course of his daily duties. On this occasion, he was carrying only a lightweight pair of handcuffs and was not hurrying. There was nothing defective about the stairs themselves and nothing on them that caused him to fall. Petitioner's attorney referred him to Dr. Gornet for evaluation, and Petitioner was diagnosed with disc herniations at C3-4 and C6-7.

14IWCC0272

Arbitrator Granada found that Petitioner failed to meet his burden of proof regarding the issue of accident. He noted that Illinois courts have found that ascending or descending stairs is not a hazard uniquely related to an employee's employment. The Arbitrator found that nothing about the stairs or Petitioner's descent created an increased risk of injury to Petitioner.

The Commission views the evidence differently and finds the facts of this case remarkably similar to those in *Village of Villa Park v. IWCC*, 2013 IL App (2d) 130038WC. In *Villa Park*, the Appellate Court found that the claimant, a community service officer's, frequent use of stairs placed him in a position of greater risk of falling than the general public. The claimant's knee gave out as he was descending the stairs at the police station. These stairs led to a secured area not open to the general public and accessible only with a pass key. The *Villa Park* claimant had suffered a knee injury at home a few months before his fall at work, but the fall resulted in a new back injury and an exacerbation of his knee injury. The Arbitrator found that the claimant failed to prove that his injuries arose out of and in the course of his employment, because the act of walking down stairs did not establish a risk greater than those faced outside the work place. The Commission reversed the Arbitrator's denial of benefits, finding that the claimant's necessary and repeated use of the stairs for his employment exposed him to a greater risk than the general public. The Circuit Court confirmed the Commission, and the employer appealed to the Appellate Court. The Court noted that an injured worker must prove that his accident occurred both "in the course of" and "arose out of" his employment in order to obtain benefits and discussed what was required under both prongs. The Court cited *Sisbro* for the Supreme Court's description of "arising out of": "if the employee was performing acts he was instructed to perform by his employer, acts which he had a common law or statutory duty to perform, or acts which the employee might reasonably be expected to perform incident to his assigned duties. . . A risk is incidental to the employment where it belongs to or is connected with what an employee has to do in fulfilling his duties."*Sisbro, Inc. v. Indus. Comm'n*, 207 Ill. 2d 193, 203, 797 N.E.2d 665, 278 Ill. Dec. 70 (2003). The Appellate Court then discussed the three categories of risk: direct, personal, neutral. A fall caused by a weak knee would be a personal risk and non-compensable unless the claimant's employment significantly contributed to the injury by placing him in a position of increased risk of falling. Falling down stairs is a neutral risk, which would be non-compensable, unless the claimant was exposed to an increased risk of injury by his employment.

The Court further noted that the increased risk may be qualitative or quantitative, such as where the claimant is exposed to a common risk more frequently than the general public, citing *Illinois Consolidated Telephone Co. v. Indus. Comm'n*, 314 Ill. App. 3d 347, 352-53, 732 N.E.2d 49, 247 Ill. Dec. 333 (2000). In *Villa Park*, the claimant was required to transverse the stairs a minimum of six times per day for his own personal comfort and to complete his work-related activities. The requirement that he use the stairs constituted an increased risk on a quantitative basis from the risks to which the general public is exposed. Therefore, the Appellate Court affirmed the Commission's finding of accident and award of benefits.

14IWCC0272

The facts in this case are nearly identical to those in *Villa Park*. In both cases, the claimant was required by the demands of his job to utilize stairs more frequently than would the general public. In both cases, the stairs on which the claimant was injured were utilized only by employees, not the public, and in both cases, the employee had to use the stairs at least six times a day. This presented a quantitatively increased risk of injury to the Petitioner and satisfied the "arising out of" requirement in the Act. The Commission finds that Petitioner here was injured in the course of his employment and that his injury arose out of that employment. Respondent is ordered to pay for Petitioner's related medical expenses (See PX6). Temporary total disability is not at issue, as Petitioner continued to work either light or full duty following his accident.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the related medical expenses as evidenced in PX6 at the fee schedule rate, pursuant to Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under Section 19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision.

DATED: APR 11 2014

Daniel R. Donohoo

Charles J. DeVriendt

Ruth W. White

o-03/26/14
drd/dak
68

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Michael Childers,
Petitioner,

vs. No. 06 WC 006301
No. 06 WC 018557

Metropolis Fire Department,
Respondent.

14IWCC0273

DECISION AND OPINION ON REVIEW UNDER SECTION 8(a)

This cause comes before the Commission on Petitioner's Petition for Review of Prior Award and Prospective Medical Care Pursuant to Section 8(a) of the Illinois Workers' Compensation Act, filed on April 4, 2013. The arbitration hearing was held on March 14, 2007, after which Arbitrator Dibble issued a decision on April 23, 2007. The sole issue at hearing was the nature and extent of Petitioner's permanent disability, and Arbitrator Dibble awarded Petitioner $91,511.00 in related medical expenses and 22.5% of the person as a whole for his cervical spine injuries which occurred in the course of and arose out of his employment on January 2, 2004 and March 8, 2006. Neither party appealed the Arbitrator's Decision.

The hearing addressing Petitioner's Petition under Section 8(a) was held before Commissioner Donohoo on May 15, 2013.

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner testified at hearing on May 15, 2013 that since this matter was tried in March 2007, he has continued to treat with Dr. Gornet for his neck and with Dr. Granberg and Dr. Boutwell for pain management related to his cervical condition. He stated that his condition had steadily worsened since the March 2007 hearing, despite his conservative treatment with injections, creams, and oral pain medications. Dr. Gornet performed a disc replacement at C6-7 on August 29, 2013 and is currently treating Petitioner for structural changes at C2-3. Petitioner testified that he was claiming only medical expenses under Section 8(a), not temporary total disability benefits or additional permanent partial disability.

Respondent argued that Petitioner's post-arbitration treatment was not related to his 2004 and 2006 work injuries, but to a 1999 work-related cervical spine injury and resulting C3-6 fusion. Petitioner underwent this fusion surgery three to four years prior to initiating treatment with Dr. Gornet for his 2004 work injury in 2005. Dr. Gornet opined that Petitioner's current complaints at C2-3 resulted from adjacent level failure. The doctor explained that Petitioner's disc replacement at C6-7 caused abnormal movement of his cervical spine, resulting in structural changes at C2-3, on the opposite end of Petitioner's fusion. Dr. Gornet causally related Petitioner's C2-3 complaints to his 2004 and 2006 work accidents.

Respondent's Section 12 examiner, Dr. Petkovich, opined that Petitioner's cervical complaints at C2-3 resulted from idiopathic and degenerative changes unrelated to his 2004 and 2006 accidents. Dr. Petkovich agreed with Dr. Gornet that Petitioner's C2-3 complaints are related to his adjacent multi-level fusion performed prior to Petitioner's 2004 and 2006 work accidents. Dr. Petkovich opined that Petitioner's C3 through C6 fusion mechanically stressed the levels above and below it, causing or contributing to Petitioner's degenerative arthritic changes at C2-3. According to Dr. Petkovich, Petitioner's disc replacement at C6-7 could not have caused Petitioner's symptoms at C2-3, because of the C3-6 fusion between those levels, and Petitioner's C2-3 complaints could therefore not be causally related to his work accidents in 2004 and 2006.

The Commission finds Dr. Petkovich's opinions more persuasive than Dr. Gornet's. Petitioner's 2004 and 2006 work accidents caused injury to his cervical spine at C6-7. This area is separated by a fused segment of Petitioner's cervical spine stretching from C3 through C6 from the area currently causing Petitioner's complaints at C2-3. Even if, as represented by Dr. Gornet, the disc replacement caused Petitioner's cervical spine to move abnormally, it does not seem reasonable that a level several fused discs removed from the replacement would be adversely affected so as to result in adjacent level complaints. Therefore, the Commission adopts Dr. Petkovich's opinion that Petitioner's complaints at C2-3 and resulting need for treatment are not causally connected to his 2004 and 2006 work accidents, but are rather the result of progressive degenerative arthritis. Petitioner's current complaints are not related to his disc replacement at C6-7 which resulted from his 2004 and 2006 work injuries, but to his adjacent multi-level disc fusion which resulted from his 1999 work injury.

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IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's Petition for Review of Prior Award and Prospective Medical Care is denied.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 11 2014

Daniel R. Donohoo

Charles J. DeVriendt

Ruth W. White

o-03/26/14
drd/dak
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STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Darrell Lewis,
Petitioner,

vs.

NO: 10 WC 47167

14IWCC0274

Midwest Automatic Door,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of temporary total disability, medical expenses and penalties and attorneys' fees and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 8, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

14IWCC0274

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $21,700.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 11 2014

Daniel R. Donohoo

Ruth W. White

Charles J. DeVriendt

o-03/19/14
rww/wj
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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

LEWIS, DARRELL
Employee/Petitioner

Case# **10WC047167**

MIDWEST AUTOMATIC DOOR
Employer/Respondent

14IWCC0274

On 5/8/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0512 NOONAN PERILLO POLENZANI & MAR
JASON S MARKS
25 N COUNTY ST
WAUKEGAN, IL 60085

2837 LAW OFFICES OF THADDEUS GUSTAFSON
MICHELLE POWELL
2 N LASALLE ST SUITE 2510
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Darrell Lewis
Employee/Petitioner

v.

Midwest Automatic Door
Employer/Respondent

Case # 10 WC 47167

Consolidated cases: _____

14IWCC0274

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Cronin**, Arbitrator of the Commission, in the city of **Chicago**, on **February 8, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [ ] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [ ] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [ ] Is Petitioner entitled to any prospective medical care?
L. [x] What temporary benefits are in dispute?
[ ] TPD [x] Maintenance [x] TTD
M. [x] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [x] Other **Vocational Rehabilitation**

FINDINGS

On the date of accident, **September 8, 2010**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being *is* causally related to the accident.

In the year preceding the injury, Petitioner earned $**66,665.56**; the average weekly wage was $**1,282.03**.

On the date of accident, Petitioner was **42** years of age, ***married*** with **1** dependent children.

Respondent *has* paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**85,899.26** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**85,899.26**.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $**854.69**/week for **84-1/7** weeks, commencing **9/15/10** through **4/25/12**, as provided in Section 8(b) of the Act.

Maintenance

Respondent shall pay Petitioner maintenance benefits of $**854.69**/week for **41-2/7** weeks, commencing **4/26/12** through **2/8/13**, as provided in Section 8(a) of the Act.

Penalties

Respondent shall pay to Petitioner penalties of $**300.00**, as provided in Section 19(l) of the Act.

Vocational Rehabilition

Respondent shall provide vocational rehabilitation benefits for Petitioner pursuant to Section 8(a) of the Act.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

14IWCC0274

5/7/13

Signature of Arbitrator

Date

ICArbDec19(b)

MAY - 8 2013

ILLINOIS WORKERS' COMPENSATION COMMISSION

DARRELL LEWIS Employee/Petitioner	)	
v.	)	Case No.: 10 WC 47167
MIDWEST AUTOMATIC DOOR Employer/Respondent	)	Setting: Chicago

14IWCC0274

FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT OF ARBITRATOR'S 19(b) DECISION

FINDINGS OF FACT

Petitioner was previously employed by Respondent as a service technician. Respondent services and installs commercial doors. Prior to working for Respondent, Petitioner worked for Door Systems for six years. Door Systems also services and installs commercial doors and Petitioner's job duties with Door Systems were similar to those he had with Respondent. (Petitioner's testimony)

Petitioner testified extensively regarding a typical day on the job with Respondent. He is required to travel to various locations for service and installation of commercial automatic doors. Upon arrival on the site, he diagnoses the customer's particular problem and often is required to remove the door panels from the frame. Depending upon the problem, Petitioner either repairs the existing door or is required to install a new door. (Petitioner's testimony)

Petitioner testified that he is required to lift in excess of 50 pounds on a daily basis as part of his job as a service technician with Respondent. Petitioner testified that the average door he had to service and take down weighed a minimum of 100 pounds. In some doors, Petitioner continued, a panel of glass can weigh more than a couple hundred pounds. His job involved extensive use of both hands in order to, among other things, operate power and manual tools. (Petitioner's testimony)

As part of his employment, Petitioner was required to service and install automatic swing doors, automatic sliding doors, revolving doors, hollow metal doors and manual swing doors. Petitioner offered specific testimony regarding work he personally performed on the doors. Petitioner testified that he was required to install and/or remove the particular door panels. (Petitioner's testimony)

On September 8, 2010, Petitioner was working at a Sears store with another employee of Respondent. He was using a hammer with his right hand and using his left hand to hold a threshold. He sustained an injury to the middle finger on his left hand when he struck it with the hammer. (Petitioner's testimony)

Petitioner advised David Walker of the injury, but continued working for several days before seeking medical treatment. Petitioner thought the injury was just a contusion and that it would resolve. In light of continued problems, Petitioner eventually sought medical treatment. (Petitioner's testimony)

Petitioner testified that he did not believe that he could perform his job while wearing a splint on the middle finger of his non-dominant hand. He reported pain with lifting. (Petitioner's testimony)

Petitioner testified that he was unable to return to work and had been terminated from his position with Respondent. He testified that he received TTD benefits through August 26, 2012. (Petitioner's testimony)

Petitioner testified that as of the date of trial, he had pain in his left middle finger that ran up his elbow. (Petitioner's testimony)

Petitioner was seen in the emergency room at Ingalls Memorial Hospital on September 14, 2010. He was noted to have pain and swelling in his left hand following a work injury one week ago. An x-ray was performed which revealed a fracture of the distal phalanx of the left middle finger. The fracture was noted to extend to the articular surface and was slightly displaced. Petitioner was discharged with instructions to follow-up with Dr. Fanto, an orthopedic surgeon. (PX 22, pp. 40-46)

Petitioner was taken to surgery on September 17, 2010, where Dr. Fanto performed an arthrotomy of the left middle finger DIP joint as well as an open reduction internal fixation of the intraarticular fracture of the left middle finger. Petitioner underwent a course of physical therapy subsequent to surgery. Additional surgery was performed on November 8, 2010, at which time Dr. Fanto removed two pins that were placed at the time of the original surgery. (RX 1)

Due to continued complaints of pain, Petitioner returned to the emergency room at Ingalls Memorial Hospital on December 21, 2010. An x-ray was performed which revealed a non-union of the left middle finger DIP joint. He was also diagnosed with an infected wound. (PX 22, pp. 21-28)

Petitioner was seen by Dr. Daniel Mass at the University of Chicago Hospitals on March 25, 2011, in order to obtain a second opinion. Dr. Mass examined Petitioner and provided him with the option of repeating the open reduction internal fixation of the fracture in order to preserve some motion at the DIP joint or, alternatively, undergoing a fusion. (PX 23, pp. 162-163)

Petitioner elected to proceed with the repeat open reduction internal fixation procedure and this was performed by Dr. Mass on May 9, 2011, at the University of Chicago Hospitals. Petitioner followed up with Dr. Mass subsequent to surgery and began physical therapy. Additional surgery was performed on September 20, 2011, to remove the screws. (PX 23, pp. 153-160)

Petitioner continued to complain of pain in his left middle finger and left hand following the surgical procedures performed by Dr. Mass. On November 15, 2011, Dr. Mass suggested that Petitioner restart formal physical therapy. On December 19, 2011, Dr. Mass recommended that Petitioner undergo work hardening and that he complete a functional capacity evaluation ("FCE") at the conclusion of the work hardening program. (PX 23, pp. 149-150)

Work hardening was performed at ATI Physical Therapy in Matteson from February 1, 2012 through February 24, 2012. Four progress reports were generated by the therapist at ATI throughout the course of Petitioner's work hardening. The progress reports all indicate Petitioner's complaints of pain in his left middle finger with lifting activities. Additionally, the reports note that as Petitioner was required to lift heavier weights, the pain increased with radiation through his hand and up through his forearm and, at times, to his left elbow. He was also noted to have swelling of his finger with increased lifting and gripping. (PX 25, pp. 21, 28, 39 and 50)

Petitioner completed an FCE at ATI Physical Therapy on February 22, 2012. The evaluator found that the test was a valid representation of Petitioner's present physical capabilities. His functional capabilities were found to be most consistent with the medium physical demand level, which is defined as 50 pounds of occasional lifting. The evaluator further noted strength deficits regarding his left hand (involved) versus his right hand (uninvolved) and Petitioner was noted to display limited flexion of his L middle MIP and DIP joints. The FCE went on to state as follows:

> There was swelling of his entire L middle finger during and after every lift he performed. He used his L middle finger sparingly during all nuts and bolts activities when asked to tighten the nuts with his L hand. He displayed difficulties with the dexterity of his L middle finger during these activities due to swelling and pain. As the swelling and pain increased so did these difficulties.

Due to his displayed difficulties with manipulating the nuts and washers during nuts and bolts activities, the evaluator recommended left hand fine grasping at a minimally occasional frequency. Petitioner was unable to wrap his left middle finger around the handles during any of his lifts. Therefore, the evaluator recommended left hand firm grasping at an occasional frequency. (PX 25, pp. 10-11)

Petitioner was last seen by Dr. Mass on April 23, 2012. He was noted to be status post open reduction and internal fixation and hardware removal with residual osteoarthritis of his DIP joint. He noted that Petitioner demonstrated pain and swelling with usage and demands greater than 30 pounds. Dr. Mass indicated that Petitioner could attempt to return to work with occasional lifting up to 30 pounds with the left hand with breaks that would allow him to ice his finger and take anti-inflammatories to reduce swelling. Dr. Mass noted that if Petitioner is unable to successfully return to work with these restrictions, he should consider undergoing a fusion or finding a new line of work that did not require him to lift such heavy loads. (PX 25, p. 147 and PX 24, p. 1)

Petitioner was terminated by Respondent while he was treating with Dr. Mass. Petitioner was therefore unable to return to his prior employment after he received permanent restrictions

from Dr Mass on April 23, 2012. As Respondent did not have work for Petitioner within his restrictions, Petitioner was paid temporary total disability benefits by Respondent.

On September 5, 2012, Petitioner received a letter from Respondent's insurance carrier advising him that his temporary total disability benefits had been discontinued. Notwithstanding the date of the letter, Petitioner did not receive any temporary total disability benefits beyond August 26, 2012. (Petitioner's testimony)

The condition of Petitioner's left middle finger has not changed since he last saw Dr. Mass. He has pain and swelling of the finger with any increased activity and lifting. (Petitioner's testimony)

Petitioner has searched the internet in an attempt to find employment as a service technician. He testified regarding job postings with BH Pace, Atlas Door Repair and ASSA ABLOY Entrance System. Based on the job descriptions, these positions are similar to the position Petitioner had with Respondent. The job requirements for each of these positions indicated that the individual should be able to safely lift at least 80 pounds. Petitioner testified that he did not apply for these positions as they are outside of the restrictions indicated by Dr. Mass. (Petitioner's testimony)

Petitioner wore a splint at the time of the hearing and demonstrated how the splint limits the motion of his left middle finger. Petitioner testified that he is unable to perform his job as a service technician and installer of commercial doors while using a splint as it affects his ability to safely lift, maneuver and carry commercial door panels that weigh in excess of 100 pounds. The splint also affects his ability to grip and grasp with his left hand which is essential for the job. (Petitioner's testimony)

On cross-examination, Petitioner acknowledged that he collected unemployment while he received TTD benefits. When asked, Petitioner demonstrated that he was able to make a fist with his left hand, although he was unable to completely close his left middle finger. Petitioner testified that he had not completed a job search either before or after the termination of his TTD benefits. He submitted no job search records or logs. He testified that he also looked for work at Walgreen's and K-Mart, but that no one would hire him because he was on workers' compensation. He has not treated with Dr. Mass since April 23, 2012. Petitioner has not tried to work with a splint. He has not contacted the union with regard to a return to work. (Petitioner's testimony)

Given the condition of his left middle finger, Petitioner testified that he is not able to return to his prior employment as a service technician and installer of commercial doors. Petitioner cited the lifting requirements of the position and indicated that he is unable to safely lift, maneuver and carry commercial door panels due to pain and swelling of his left middle finger. His opinion is also based on his inability to grip and grasp things with his left hand which he is required to do as part of his job. Petitioner testified that safety is a large issue in the industry and that the pain he experiences in his left middle finger (which radiates through his forearm and elbow) while lifting

heavy objects will not allow him to safely perform his job as a service technician and installer of commercial doors. (Petitioner's testimony)

David Walker

David Walker testified that he is currently the General Manager for Midwest Automatic Door and has been so since July of 2012. Prior to that, he was a Vice-President and Co-Owner of Respondent. Respondent services and installs commercial doors in buildings such as Sears, Starbucks and Walmart. Respondent performs work at many buildings in the downtown Chicago area. (David Walkers' testimony)

Mr. Walker is familiar with Petitioner as he previously worked for Respondent as a service technician. Petitioner was required to service and install commercial doors as part of his job with Respondent. His job involved lifting the door/door panels and all associated parts as well as the using hand tools and doing electrical wiring. (David Walkers' testimony)

The service technician is required to travel to a job site and investigate customer complaints regarding commercial doors. Oftentimes this involves removing the door from the frame and, potentially, replacing the door. Service technicians are required to safely lift, maneuver and carry the commercial door panels. (David Walkers' testimony)

Many of the door panels weigh in excess of 100 pounds and can be several hundred pounds. Mr. Walker testified regarding doors of Dorma Automatics, Besam, Hunter Automatics, Stanley and Gyro Tech and indicated that these doors are similar to those used by Respondent and serviced and installed by Respondent's technicians. He testified regarding the written materials from each of these companies that indicated door panel weights ranging from 200 to 440 pounds per leaf/panel. (David Walkers' testimony)

Mr. Walker offered testimony that he could not hire a service technician who could not safely lift, maneuver and carry a commercial door leaf/panel or other components weighing in excess of 50 pounds. He stated that the doors contained glass and, obviously, posed a safety hazard if they are unable to be moved without being dropped. (David Walkers' testimony)

On cross-examination, Mr. Walker testified that the doors Respondent serviced at the time of the accident, weighed, without the glass panels in them, a minimum of 40 pounds. He testified that doors from different manufacturers weigh different weights. A service technician worked by himself, or in multiple-person crews. If a service technician went out on a job and discovered that he had to lift 150 pounds, he could call in and get another technician to help him.

Timothy P. Conrin

Timothy P. Conrin is employed at Door Systems as a supervisor. Door Systems services and installs commercial doors. He has been in the commercial door service and installation business for over 30 years. He is familiar with the job duties of a service technician. (Timothy Conrin's testimony)

He knows Petitioner from his prior employment with Door Systems. Petitioner was a

service technician while at Door Systems and serviced and installed commercial doors. The doors weighed 80 to 220 pounds per panel. (Timothy Conrin's testimony)

Tim Conrin testified regarding the job duties of a service technician. A service technician is required to safely lift, maneuver and carry commercial door panels that weigh in excess of 100 pounds and to perform gripping and grasping activities with both hands. Additionally, a service technician is required to operate both manual and power tools. He characterized the job as physical. (Timothy Conrin's testimony)

In his opinion, as someone who has worked in the industry for over 30 years, an individual with a 50 pound lifting restriction and diminished ability to grip and grasp things with his hands cannot work safely as a commercial door service technician and installer. Mr. Conrin testified that there is a significant safety issue given the fact that the commercial doors are heavy, loaded with glass and repairs are often performed in the area of the general public. He would not hire someone for the service technician position who has these types of restrictions. (Timothy Conrin's testimony)

Dave Krasnopolski

Dave Krasnopolski is a service technician for Door Systems. He installs and services commercial doors. He has been a service technician and installer of commercial doors for more than 15 years. He is familiar with Petitioner and worked with him at another company prior to beginning his employment with Door Systems. (Dave Krasnopolski's testimony)

He identified the specific types of doors that he works on as a service technician, including automatic sliding doors, automatic swing doors, manual swing doors, revolving doors and hollow metal doors. Mr. Krasnopolski described the physical requirements of the job and indicated that a service technician is often required to safely lift, maneuver and carry door panels that weigh in excess of 100 pounds. He described the job as physical. He indicated that he would not be able to perform his job if he had to wear a splint on his finger much like the one Petitioner was wearing at the time of the hearing. He stated that the splint would compromise his ability to lift heavy objects and to grip and grasp objects with his hands. (Dave Krasnopolski's testimony)

In his opinion, as someone who has been a service technician for over 15 years, an individual with a 50 pound lifting restriction and a diminished ability to grip and grasp things with his hands cannot work safely as a commercial door service technician and installer. (Dave Krasnopolski's testimony)

Elizabeth Walker

Elizabeth Walker testified that she is currently the office manager for Midwest Automatic Door. She was the President of Midwest Automatic Door from February 28, 2005 through July 11, 2012. Throughout that time period, she was the human resources contact at the company. (Elizabeth Walker's testimony)

She is familiar with Petitioner as he was previously employed by Respondent.

Essentially, Ms. Walker testified that Petitioner was terminated for improper use of his company credit card and being written up several times. Petitioner was not discharged until approximately 11 months after the alleged improper charges. Elizabeth Walker did not produce any written material to confirm or support her allegation that Petitioner was written up on several occasions. Furthermore, Ms. Walker testified that Petitioner was terminated for collecting unemployment benefits while employed by Respondent. (Elizabeth Walker's testimony)

Adrian Zaharia

Mr. Zaharia was hired by Respondent's workers' compensation insurance carrier to perform surveillance on Petitioner. He testified regarding his reports of October 1, 2011, December 1, 2011 and January 12, 2013. (Adrian Zaharia's testimony)

In summary, Mr. Zaharia performed surveillance of Petitioner on four separate occasions on September 15, 2011 through September 28, 2011. These dates were summarized in his report of October 1, 2011. He observed Petitioner drive to a fast food restaurant and walk his dog along the street during the aforementioned dates. He did not observe Petitioner performing any other physical activity. (Adrian Zaharia's testimony)

He took additional surveillance of Petitioner on November 23, 2011 and November 28, 2011, which were summarized in his report dated December 1, 2011. On those dates he observed Petitioner walking from his residence to the corner and possibly biting his fingernails. He did not observe Petitioner perform any other physical activity on the aforementioned dates. (Adrian Zaharia's testimony)

Finally, he surveilled Petitioner on January 9, 2013 and January 10, 2013. These dates are outlined within his report of January 12, 2013. He observed Petitioner talking on his mobile phone and rolling a garbage can to the curb with both hands on January 9, 2013. On January 10, 2013, he observed Petitioner holding a cigarette in his left hand. He did not observe Petitioner performing any other physical activity on those dates.

Mr. Zaharia testified that the only time Petitioner was seen wearing a splint was when he went to a doctor's appointment. (Adrian Zaharia's testimony)

Dr. Michael Cohen

Dr. Cohen examined Petitioner on three separate occasions and authored four reports which were admitted into evidence at the time of trial. (RX 1, RX 2, RX 3 and RX 4)

In his report of December 21, 2011, Dr. Cohen indicated that Mr. Lewis continues to have a non-union and arthritic changes at the distal interphalangeal joint of his left middle finger related to the original injury of September 8, 2010. Dr. Cohen opined that Mr. Lewis should have occupational therapy/work hardening until his progress plateaus and, if he continues to have

significant pain at the distal interphalangeal joint that is not resolved or significantly improved with further therapy, he should consider undergoing a distal interphalangeal joint fusion. As of December 21, 2011, Dr. Cohen indicated that Mr. Lewis could work with a splint on the left middle finger and with a 15 to 20 pound weight restriction. He went on to state that if the above recommended therapy is successful, he would be able to return to his normal job activities without restriction at the end of therapy . . . if that is unsuccessful, then he would require a fusion and determination of a specific date of return to full-duty work, which would be difficult to determine at that time since it would depend on his recovery from the surgery. (RX 2)

Petitioner was examined for the third and final time by Dr. Cohen on April 25, 2012. Dr. Cohen wrote that Petitioner does have some motion at the DIP joint, but that he also has crepitance and pain in the DIP joint. Dr. Cohen performed x-rays which showed evidence of arthritis and non-union at the DIP joint. His diagnosis was a non-union of the left middle finger DIP joint with associated arthritis - - which is related to the original injury of September 8, 2010. He indicated that Petitioner was at a plateau in improvement and continued to recommend a fusion of the DIP joint. Dr. Cohen opined that if Petitioner decides not to have the surgery, then he believes he is at maximum medical improvement. Dr. Cohen further opined that Mr. Lewis is capable of gainful employment in a modified fashion, i.e., with a splint on the middle finger. While he mentioned the FCE in the "History of Present Injury", Dr. Cohen makes no mention of its findings or of the lifting and other requirements of Petitioner's specific employment as a commercial door service technician and installer. (RX 3)

On July 17, 2012, Dr. Cohen authored an addendum report after reviewing a video job analysis that was provided to him by the workers' compensation insurance carrier. The question from the workers' compensation insurance carrier was whether Petitioner could perform his full work duties with a finger splint. Upon his review of the 10 minute and 11 second video job analysis, Dr. Cohen opined that it does not appear that Mr. Lewis' wearing of a splint on his left middle finger, i.e., on his non-dominant hand, would prevent him from doing his job activities. He further indicated, on the basis of the job video, that he believed Petitioner could work with a splint on his left middle finger. He recommended a streamlined splint. (RX 4)

Petitioner testified that the video job analysis did not depict his complete job duties. He testified that Petitioner's Exhibit 20 depicts some, but not all, of the job duties associated with the position of service technician. (Petitioner's testimony)

CONCLUSIONS OF LAW

In Support of the Arbitrator's Decision Regarding F (Causal Connection), the Arbitrator Finds as Follows

Petitioner sustained an acute injury to the middle finger of his left hand on September 8, 2010, when he struck it with a hammer. Petitioner has undergone four surgical procedures, including two open reduction internal fixation procedures, to repair an intraarticular fracture. Petitioner underwent extensive physical therapy, including work hardening, and completed an FCE on February 22, 2012, which was found to be valid and reliable.

Petitioner last saw Dr. Mass on April 23, 2012, at which time he was noted to have residual arthritis of the DIP joint and pain and swelling with usage and with lifting of greater than 30 pounds. Dr. Cohen, Respondent's examining physician, last evaluated Petitioner on April 25, 2012. It was his opinion that Petitioner continued to have a non-union at the left middle finger DIP joint with associated arthritis. Dr. Cohen clearly stated that Petitioner's current condition is related to the original injury of September 8, 2010.

Based on the forgoing, the Arbitrator finds Petitioner's current condition of ill-being to be causally related to his work accident of September 8, 2010. Both Doctors Mass and Cohen agree as to Petitioner's diagnosis and its causal connection to the work accident.

In Support of the Arbitrator's Decision Regarding O (Vocational Rehabilitation), the Arbitrator Finds as Follows

While Dr. Mass and Dr. Cohen agree as to Petitioner's current diagnosis and its causal connection to the work accident, they disagree as to his current restrictions and whether those restrictions prevent him from returning to his prior line of employment. Dr. Mass has provided Petitioner with restrictions of occasional lifting up to 30 pounds with the left hand with breaks to ice his finger and to take anti-inflammatory medications. He further opined that if Petitioner is unable to perform his job within these restrictions, he should find other work that would not require him to lift such heavy loads.

Dr. Cohen does not believe Petitioner requires a weight restriction. Rather, after reviewing a 10 minute video, Dr. Cohen believes that Petitioner can return to his prior line of employment with the only restriction being the use of a splint on his left middle finger.

Petitioner underwent an FCE on February 22, 2012, which was found to be valid and reliable. The FCE placed him at the medium physical demand level with occasional lifting up to 50 pounds. Petitioner was noted to have strength deficits in his left hand as opposed to his right hand. He experienced swelling of his entire left middle finger during and after every lift he performed. He was noted to have difficulty with nuts and bolts activities and with the dexterity of his left middle finger due to pain and swelling. Based on these difficulties, it was recommended that he perform left hand fine grasping with only a minimally occasional frequency and left hand firm grasping with an occasional frequency.

The testimony and other evidence at trial clearly established that Petitioner is required to lift in excess of 50 pounds relatively frequently in order to perform his job as a commercial door service technician and installer. All witnesses testified that the weights of the door panels often exceed 100 pounds and can weigh up to several hundred pounds. The ability to safely lift, maneuver and carry these door panels is essential in Petitioner's line of work as the doors are filled with glass. The six videos contained on Petitioner's Exhibit No. 20 depict the physical nature of the job and that the service technician is required to have full use of both hands.

Based on the foregoing, the Arbitrator finds the opinions of Dr. Mass (with regard to Petitioner's restrictions) to be more persuasive than that those offered by Dr. Cohen. The FCE was found to be valid. The evaluator noted that Petitioner had significant difficulties with pain and swelling of his left middle finger associated with lifting, gripping and grasping activities. The Arbitrator finds that Dr. Mass considered the functional capacity evaluation in determining Petitioner's restrictions. The testimony of all witnesses established that Petitioner is not able to return to his line of work as a commercial door service technician due to the lifting, gripping and grasping requirements needed to safely fulfill one's job duties in that profession. Taken as a whole, the testimony and other evidence also establish that Petitioner could not safely perform his prior job simply by using a finger splint as indicated by Dr. Cohen. It appears that Dr. Cohen's opinion fails to consider the findings of the valid FCE wherein it clearly stated that Petitioner experienced significant increased pain and swelling in his left middle finger with lifting, gripping and grasping activities.

Based on the foregoing, the Arbitrator finds that Petitioner could not safely perform his job as a service technician with the use of a finger splint as indicated by Dr. Cohen.

Petitioner has elected not to proceed with the fusion surgery. Dr. Mass and Dr. Cohen believe, therefore, that he is at maximum medical improvement ("MMI").

The Arbitrator places more weight on the opinions of Dr. Mass and the FCE evaluator than he does on the opinions of Dr. Cohen.

Petitioner is unable to return to work within the restrictions imposed by Dr. Mass and the FCE evaluator. Notwithstanding Petitioner's limited job search, the Arbitrator finds that Petitioner is entitled to vocational rehabilitation pursuant to Section 8(a) of the Act.

In Support of the Arbitrator's Decision Regarding L (TTD/Maintenance), the Arbitrator Finds as Follows

Petitioner was last seen by Dr. Mass on April 23, 2012. At that time he was given permanent restrictions. Petitioner was seen by Dr. Cohen on April 25, 2012, and found to be at maximum medical improvement. In light of the Arbitrator's decision regarding Petitioner's inability to return to work and entitlement to vocational rehabilitation, the Arbitrator finds that Petitioner was entitled to temporary total disability benefits from September 15, 2010 through April 25, 2012, at which point his condition stabilized and he was found to be at maximum medical improvement. The Arbitrator further finds that Petitioner is entitled to maintenance benefits from April 26, 2012, through February 8, 2013, as Petitioner was unable to return to his prior line of

employment due to his restrictions.

In Support of the Arbitrator's Decision Regarding M (Penalties and Attorneys' Fees), the Arbitrator Finds as Follows

Respondent forwarded correspondence dated September 5, 2012, to Petitioner's counsel advising that Petitioner's temporary total disability benefits were being terminated. However, Respondent failed to pay Petitioner's benefits beyond August 26, 2010.

Section 7110.70(b) of the Rules governing practice before the Illinois Workers' Compensation Commission provide as follows:

> When an employer begins payment of temporary total compensation and later terminates or suspends further payment before an employee in fact has returned to work, the employer shall provide the employee with a written explanation of the basis for the termination or suspension of further payment no later than the date of the last payment of temporary total compensation. 50 Ill. Adm. Code Chapter II Section 7110.70(b). Failure to comply with the provision without good and just cause shall be considered by the Commission or an arbitrator when adjudicating a petition for additional compensation pursuant to Section 19(l) of the Act. 50 Ill. Adm. Code Chapter II, Section 7110.70(e).

Section 19(l) of the Act provides for penalties of $30.00 per day for each day that the Respondent refuses to pay benefits pursuant to Section 8(b).

The Arbitrator finds that Respondent failed to comply with Commission rules when they terminated Petitioner's benefits pursuant to its correspondence of September 5, 2012, but failed to pay Petitioner beyond August 26, 2012. This represents a period of 10 days.

In light of the above, the Arbitrator assesses penalties against Respondent under Section 19(l) in the amount of $300.00 ($30.00 per day x 10 days).

STATE OF ILLINOIS	)	☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
	)	☒ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
	SS.		
COUNTY OF SANGAMON	)	☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
			☐ PTD/Fatal denied
		☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Margaret Skagg,
Petitioner,

vs. No: 12 WC 17823

14IWCC0275

State of Illinois,
Department of Revenue.
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issue of accident, medical expenses, temporary disability and permanent disability, and being advised of the facts and law, corrects the Decision of the Arbitrator as stated below and otherwise affirms and adopts the May 3, 2013 Decision of the Arbitrator, which is attached hereto and made a part hereof.

After considering the entire Record, the Commission corrects several typographical errors in the Arbitrator's decision. The Commission affirms the Arbitrator's finding that the injury manifested itself on December 10, 2002. The Commission corrects page six, first paragraph, fourth full sentence to read "On December 10, 2002, Dr. Bergman noted that Petitioner's wrist splints were no longer helping Petitioner's bilateral CTS symptoms, as Petitioner had reported on this date that her symptoms returned about 4-5 months prior."

14IWCC0275

The Commission also corrects page six, second paragraph, fifth sentence to read, "The wrist splints alleviated Petitioner's CTS symptoms for almost a year, but Petitioner then presented to Dr. Bergman on December 10, 2002, noting the splints were no longer working." In the same paragraph, the Commission corrects the last two sentences to read, "As of December 10, 2002, Petitioner knew or reasonably should have known that she had work-related, bilateral CTS in which surgery would be needed unless her job duties changed. December 10, 2002 is accordingly the manifestation date of Petitioner's injury."

The Commission also corrects page six, third paragraph, third sentence to read, "Further, the diagnosis on December 10, 2002 was related to specific work activities, and Petitioner would have known this fact at that time." Finally, the Commission corrects page seven, second paragraph, first sentence to read, "Accordingly, given a manifestation date of December 10, 2002, and the fact that Petitioner did not file an application for adjustment of claim with the Illinois Workers' Compensation Commission until May 23, 2012 (see PX 1), Petitioner's claim is barred by the statute of limitations pursuant to Section 6(d) of the Act."

All else is otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator is hereby corrected and affirmed. Petitioner's claim for compensation is denied.

DATED: APR 1 1 2014

drd/adc
o-02/25/14
68

Daniel R. Donohoo

Kevin W. Lamborn

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SKAGG, MARGARET E
Employee/Petitioner

Case# **12WC017823**

14IWCC0275

STATE OF ILLINOIS
Employer/Respondent

On 5/3/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1157 DELANO LAW OFFICES LLC
CHARLES H DELANO IV
1 S E OLD STATE CAPITOL PLZ
SPRINGFIELD, IL 62701

0499 DEPT OF CENTRAL MGMT SERVICES
MGR WORKMENS COMP RISK MGMT
801 S SEVENTH ST 6 MAIN
PO BOX 19208
SPRINGFIELD, IL 62794-9208

4993 ASSISTANT ATTORNEY GENERAL
CHRISTINA J SMITH
500 S SECOND ST
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0498 STATE OF ILLINOIS
ATTORNEY GENERAL
100 W RANDOLPH ST
13TH FLOOR
CHICAGO, IL 60601-3227

0502 ST EMPLOYMENT RETIREMENT SYSTEMS
2101 S VETERANS PARKWAY*
PO BOX 19255
SPRINGFIELD, IL 62794-9255

CERTIFIED as a true and correct copy
pursuant to 820 ILCS 305/14

MAY 3 2013

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

MARGARET E. SKAGGS
Employee/Petitioner

v.

STATE OF ILLINOIS
Employer/Respondent

Case # 12 WC 17823

Consolidated cases: _____

14IWCC0275

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Brandon J. Zanotti**, Arbitrator of the Commission, in the city of **Springfield**, on **March 7, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☒ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other: Is Respondent's Exhibit 5 admissible?

14IWCC0275

FINDINGS

On **March 15, 2011**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did not* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being *is not* causally related to the accident.

In the year preceding the injury, Petitioner earned **$61,259.00**; the average weekly wage was **$1,178.06**.

On the date of accident, Petitioner was **51** years of age, *married* with **0** dependent children.

Petitioner *has* received all reasonable and necessary medical services.

Respondent *has* paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$3,590.36** for TTD, **$.0** for TPD, **$.0** for maintenance, and **$.0** for other benefits, for a total credit of **$3,590.36**.

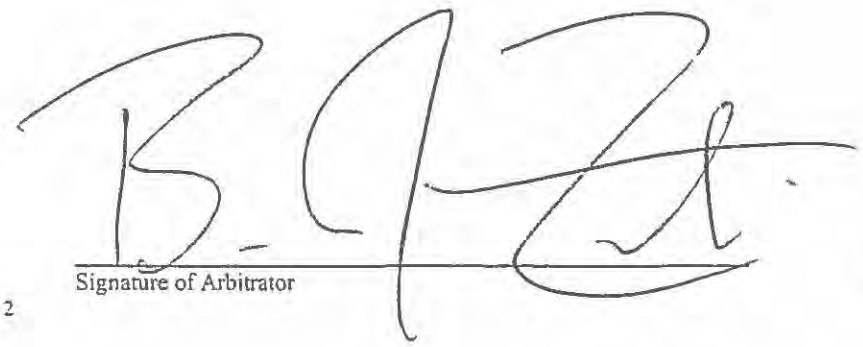
Respondent is entitled to a credit for all medical bills paid by Respondent under Section 8(j) of the Act.

ORDER

Petitioner failed to prove she sustained an accident on March 15, 2011 arising out of and in the course of her employment with Respondent. For the foregoing reasons, Petitioner's claim for compensation is denied and no benefits are awarded.

RULES REGARDING APPEALS: Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE: If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.



Signature of Arbitrator

04/29/2013
Date

MAY - 3 2013

STATE OF ILLINOIS)
)SS
COUNTY OF SANGAMON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

MARGARET E. SKAGGS
Employee/Petitioner

v.

Case # 12 WC 17823

STATE OF ILLINOIS
Employer/Respondent

14IWCC0275

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner, Margaret E. Skaggs, worked for Respondent, the State of Illinois – Department of Revenue, from June 7, 1977 until her retirement on May 31, 2012. From 1991 until her retirement in 2012, she worked in Respondent's print shop. She worked in this position for 7.5 hours per day, 5 days per week. This position required extensive typing duties, as Petitioner would be typing on a keyboard approximately 5 to 7.5 hour per day. When typing, her elbows would be against her side, with her hands off of her desk, fingers pointed down, arms not at rest, with palms parallel, and both wrists turned down. Petitioner testified she typed this way during her entire 21 year tenure in the print shop. Photographs of Petitioner's work station were entered into evidence as Respondent's Exhibit 6. Petitioner's job in the print shop also required repetitive lifting between 1 to 50 pounds. Her duties also involved the daily use of her hands for gross and fine manipulation. (See Respondent's Exhibit (RX) 3).

On June 5, 2001, Petitioner presented to Dr. Claude Fortin with bilateral hand numbness. It was noted this numbness would wake Petitioner at night and was associated with reduced hand grip strength in the day. She also reported associated wrist pain at this time. Petitioner reported that these symptoms had been going on for over a year, and were significantly worsening, particularly on the right hand/wrist. Dr. Fortin performed nerve stimulation studies, and noted said studies were consistent with bilateral median neuropathy at the bilateral wrists, moderately severe on the right with evidence of sensory axon loss, and moderate on the left. Dr. Fortin reported that the study would support surgical decompression of the median nerve at the wrist. (RX 7).

Petitioner next presented to Dr. Beth Bergman on July 24, 2001. Dr. Bergman's report on this date indicates as follows:

> "[Petitioner] is right handed. She works for the State and has for the past 25 years, doing keypunch, data entry, typing, a lot of lifting. She has had absolutely no fall or trauma. She has had right greater than left numbness and tingling. The right, in the last few months has gotten significantly worse and, in fact, she is having it happen almost every night…She has never been placed in a wrist splint."

(RX 7).

Dr. Bergman diagnosed bilateral carpal tunnel syndrome (CTS), right greater than left, and recommended a wrist splint. Dr. Berg reported to Petitioner on this visit that if she was not improved, she would need bilateral carpal tunnel releases. Dr. Berg also reported: "She will also talk to work about the possibility of Workman's Comp time off, should she need surgery." (RX 7).

Petitioner returned to Dr. Bergman over a month later on September 4, 2001. It was noted Petitioner was wearing a right wrist splint, and that it felt "wonderful." Petitioner reported she was able to sleep "pretty much the whole night through." Petitioner reported symptoms of the left hand on this visit, and that she had yet to get a left wrist splint at that time. Dr. Berg reported that Petitioner had "given some consideration to additional jobs and is, as well, considering that." Dr. Berg's impression on this date was:

> "1. Right carpal tunnel, markedly improved with splint therapy – would recommend consideration to alternate job and continued wrist splinting at night for another 3 months. She'll call earlier if she gets worse.
>
> 2. New left carpal tunnel syndrome. We will try left splint at night as well on the exact same course."

(RX 7).

Petitioner returned to Dr. Berg over a year later on December 10, 2002. The history on this date was reported as follows:

> "[Petitioner] is a patient we saw 9-4-01. She had right carpal tunnel. I put her in a splint. She was doing great. She then had left carpal tunnel. I put her in a splint and she was supposed to come in 3 months, she didn't, she states she was doing great. She now notes that 4-5 months ago she started to have symptoms of both hands. She notes no fall, no fracture, no trauma. She notes that with lay-offs at work she is having to do a lot more lifting than she normally does. She doesn't think that is going to get better and in fact she thinks it may get worse. She notes that they fall asleep during the day, several times. She wears bilateral wrist splints at night and occasionally they fall asleep 1 or 2 x a night, even with splints. She really does like her job. She hadn't thought about other types of work. She also developed some left ulnar sided wrist pain. She has not had any fall or fracture."

(RX 7).

Dr. Bergman's impression on the December 10, 2002 visit was, "Worsened carpal tunnel with no fixed neurologic deficit, most likely related to increased work load at work." Dr. Bergman reported that Petitioner had "not responded to splint therapy." Dr. Bergman recommended carpal tunnel release. The doctor also informed Petitioner that if she were to modify her job back to previous duties she might be

able to get by without surgery. If the job duties could not be modified, then Petitioner was to report back to Dr. Bergman about scheduling the CTS surgery. (RX 7).

Petitioner presented to Dr. Jeffrey Horvath on December 14, 2007, five years after the December 10, 2002 appointment with Dr. Bergman, discussed *supra*. The primary purpose of this visit was concerning a follow-up evaluation regarding Petitioner' s hip condition, which is not at issue in the present claim. On that date, however, Petitioner reported her CTS had been "acting up more." An impression was noted for, *inter alia*, "[h]istory of carpal tunnel." (RX 7).

Petitioner presented to Dr. Tomasz Borowiecki on January 24, 2008. Petitioner reported numbness and paresthesias in both hands, and that her hands had gotten progressively worse over the last few months. It was noted that Petitioner worked "in a computer room doing a lot of typing, etc." Dr. Borowiecki reported as follows:

> "[Petitioner] states that she has a diagnosis of carpal tunnel syndrome based on EMG and nerve conduction studies that she had she estimates probably five to six years ago. She gets symptoms at work while working on the keyboard and doing some of the other activities in her job in the computer room at CMS. Unfortunately, it does not sound like she has actually filed this as a workman's comp claim."

(RX 7).

Dr. Borowiecki also explained to Petitioner on the January 24, 2008 evaluation that if she felt her hand problems were work related she would need to file a claim. The doctor noted that, if the claim was accepted, he would likely recommend carpal tunnel release, as Petitioner "has had symptoms for at least five to six years." Dr. Borowiecki noted that the proposed hip surgery would likely need to occur first, as Petitioner would be using a walker and would not need to do so on fresh wrist/hand incisions from the CTS surgeries. (RX 7; PX 11, p. 27). Dr. Borowiecki testified, however, that he did not see Petitioner in the intervening three years following the 2008 hip surgery he performed. (PX 11, pp. 8-9).

Petitioner testified that her wrist pain increased, and she then presented for further nerve conduction studies on March 1, 2011 with Dr. Koteswara Narla. Dr. Narla's impression from the studies was, *inter alia*, severe carpal tunnel compression of the median nerve on the right side, and moderate to severe carpal tunnel compression of the median nerve on the left side. Dr. Narla reported that there was little else to do other than perform bilateral surgery. (RX 7).

Petitioner presented to Dr. Borowiecki on March 15, 2011. She also saw Dr. Borowiecki's physician assistant, David Purves, on this date. Petitioner reported that the numbness and tingling in her hand had progressively gotten worse over the past several years. Petitioner denied any injury or trauma, and noted that the symptoms had been present for "at least 8 years if not longer." Petitioner reported that her symptoms were worse, especially with performing work activities. Dr. Borowiecki recommended bilateral carpal tunnel releases on this date. Dr. Borowiecki discussed with Petitioner the risks of the surgery, including potential nerve and artery damage, downtime, tingling the palm after surgery, and failure of the surgery to resolve all of her symptoms. He then noted that the forgoing was true, "especially on the right side, as her symptoms have been present for so long, and her EMG shows no sensory or motor response." (PX 4; RX 7).

Petitioner underwent a right carpal tunnel release by Dr. Borowiecki on November 7, 2011, and further underwent the left carpal tunnel release on April 2, 2012. (PX 4). Petitioner was kept off work from the date of her first surgery (November 7, 2011) until December 12, 2011, and then again from her second surgery (April 2, 2012) until May 4, 2012. (PX 4; see also Arbitrator's Exhibit 1).

Dr. Borowiecki testified that he believed Petitioner's work activities certainly could have aggravated her bilateral CTS. (PX 11, p. 19). Dr. Borowiecki testified that the effect of wrist flexion during typing has a significant impact on carpal tunnel pressure. He testified that it had been clearly shown that typing in either a flexed or extended position does increase pressure in the carpal tunnel which can worsen carpal tunnel symptoms in a particular patient. (PX 11, p. 22). Dr. Borowiecki further testified that the typing performed by Petitioner was certainly one of the factors that aggravated her CTS that lead to the surgery, ultimately because of failure of resolution of symptoms with other conservative measures. (PX 11, p. 24).

Petitioner was evaluated at Respondent's request by Dr. James Williams pursuant to Section 12 of the Illinois Workers' Compensation Act, 820 ILCS 305/1 *et seq*. (hereafter the "Act") on October 3, 2012. (RX 4, Dep. Exh. 2). Dr. Williams took a job history from Petitioner from 1977 to her retirement in May 2012, as well as discussed Petitioner's job duties with her. (RX 4, pp. 9-11; p. 15). Dr. Williams also reviewed Petitioner's medical records from March 2011 through July 7, 2012. (RX 4, pp. 12-13). The doctor conducted a physical examination on Petitioner. (RX 4, pp. 13-15). Dr. Williams did not believe that Petitioner's job duties with Respondent contributed, aggravated, accelerated or caused Petitioner's bilateral CTS and resulting surgeries. (RX 4, p. 16). It was Dr. Williams' opinion that Petitioner's bilateral CTS was the result of some medical comorbidities, including hypertension, right-sided carpal-metacarpal arthritis, increased body mass index, and the fact that Petitioner was perimenopausal at the time in question. (RX 4, pp. 16-17). Dr. Williams explained why he believed those comorbidities were the cause of Petitioner's bilateral CTS. (See RX 4, pp. 17-18).

Petitioner testified that her job duties were consistent from 1991 until 2010, when her boss left employment with Respondent. She testified that when this boss left in 2010, she added more to her work load in that she began performing some of the work the boss used to do before he left. She testified that this increased work load in 2010 aggravated her bilateral CTS to the point where medical treatment was required.

Petitioner testified that currently, her bilateral hands are better, but that she still experiences tingling and some numbness in the right hand. She feels her bilateral hand strength is impaired slightly, but testified that she believed the surgeries were a success.

Petitioner is claiming Respondent is liable for medical bills she claims she incurred as a result medical treatment stemming from the bilateral CTS injuries at issue. Those bills were entered into evidence as Petitioner's Exhibits 6-9.

Respondent's Exhibit 5 was offered into evidence and is an article from a medical journal entitled "The Quality and Strength of Evidence for Etiology: Example of Carpal Tunnel Syndrome." Petitioner objected to the admission to Respondent's Exhibit 5 based upon the fact that it is hearsay.

CONCLUSIONS OF LAW

Issue (C): Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?; and

Issue (D): What was the date of the accident?

For a repetitive trauma injury, such as carpal tunnel syndrome, the date of the injury or accident is considered to be the date on which the injury manifested itself, that is, the date on which both the injury and its causal link to the employee's work became plainly apparent to a reasonable employee. *Durand v. Industrial Comm'n,* 224 Ill. 2d 53, 63, 72, 862 N.E.2d 918 (2007). Courts considering various factors have typically set the manifestation date on either the date on which the employee requires medical treatment or the date on which the employee can no longer perform work activities. *See Peoria County Belwood Nursing Home v. Industrial Comm'n,* 138 Ill. App. 3d 880, 887, 487 N.E.2d 356 (3d Dist. 1985) (holding that determining the manifestation date is a question of fact and that "the onset of pain and the inability to perform one's job, are among the facts which may be introduced to establish the date of injury"). The manifestation date is not the date on which the injury and its causal link to work became plainly apparent to a reasonable physician, but the date on which it became plainly apparent to a reasonable employee. *Id.*; *See also General Electric Co. v. Industrial Comm'n,* 190 Ill. App. 3d 847, 857, 546 N.E.2d 987 (4th Dist. 1989). However, because repetitive-trauma injuries are progressive, the employee's medical treatment, as well as the severity of the injury and particularly how it affects the employee's performance, are relevant in determining objectively when a reasonable person would have plainly recognized the injury and its relation to work. *Durand*, 224 Ill.2d at 72; *See also Oscar Mayer & Co. v. Industrial Comm'n*, 176 Ill. App. 3d 607, 610, 531 N.E.2d 174 (4th Dist. 1988).

In *Durand*, the claimant notified her supervisor in January 1998 that she had noticed pain in her hands in September or October of that year and that she believed her pain was work-related. *Durand,* 224 Ill. 2d at 55. The claimant continued to work, but sought medical help in August 2000. In September 2000, her doctors told her that she suffered from CTS related to her work. *Durand,* 224 Ill. 2d at 55. In her testimony, the claimant testified that, in January 1998, she believed her condition was work-related but did not know precisely what her condition was or that she had CTS. *Durand,* 224 Ill. 2d at 58-59. Although the Commission found that the claimant's injury occurred in September or October 1998, the Illinois Supreme Court reversed that finding and fixed the claimant's date of injury instead at September 2000, when she was diagnosed with CTS. *Durand,* 224 Ill. 2d at 73-74. To reach this conclusion, the Supreme Court relied on evidence that, before September 2000, the claimant did not know precisely what she was suffering from, did not seek medical treatment, may have had doubts as to whether she needed medical treatment, and did not suffer from a condition sufficiently severe to warrant a claim before September 2000.

The Arbitrator finds that the manifestation date of Petitioner's bilateral CTS was December 10, 2002. Petitioner saw Dr. Fortin on June 5, 2001, reporting hand and wrist symptoms for over a year prior that were worsening, more so on the right. Electrodiagnostic studies revealed bilateral CTS, more severe on the right, with axon loss on the right. Dr. Fortin reported his diagnosis supported surgery. Over a month later, on July 24, 2001, Petitioner reported progressing hand and wrist symptoms to Dr. Bergman, with the right side being worse. The diagnosis was bilateral CTS, right greater than left. Dr. Bergman noted Petitioner's job duties with Respondent, including typing and lifting, and advised her to talk to Respondent's workers' compensation personnel in the event surgery would be needed. Dr. Bergman

prescribed wrist splints at this time. Petitioner reported back to Dr. Bergman in September 2001 that the right wrist splint was working very well, and that she would start using a left wrist splint. Dr. Bergman still advised Petitioner to seek an alternate job at this time, and recommended a three-month follow-up evaluation. Petitioner, however, did not return to Dr. Bergman for over a year. On December 10, 2012, Dr. Bergman noted that Petitioner's wrist splints were no longer helping Petitioner's bilateral CTS symptoms, as Petitioner had reported on this date that her symptoms returned about 4-5 months prior. Petitioner reported she was engaging in more lifting at work, and believed the work aggravation would only get worse in time. Dr. Bergman diagnosed Petitioner with "worsened" bilateral CTS "most likely related to increased work load at work." Dr. Bergman advised Petitioner to attempt to get her work modified, as she still had not considered alternate employment at this time; in the alternative, Petitioner was to return to Dr. Bergman to schedule CTS surgery.

The Arbitrator notes that the first diagnosis of bilateral CTS was in June 2001, and later confirmed in July 2001 by Dr. Bergman. On July 24, 2001, Dr. Bergman recommended conservative treatment in the form of wrist splints. Dr. Bergman noted in July 2001 that if the splints did not alleviate the CTS symptoms, surgery would be needed. Dr. Bergman noted Petitioner's job duties as early as July 2001, and further recommended Petitioner consider alternative employment by September 2001. The wrist splints alleviated Petitioner's CTS symptoms for almost a year, but Petitioner then presented to Dr. Bergman on December 12, 2002, noting the splints were no longer working. Dr. Bergman reiterated the bilateral CTS diagnosis, and noted that said diagnosis was most likely related to Petitioner's work. Unless Petitioner changed her work, Dr. Bergman believed surgery would be needed. There is no evidence that Petitioner's job duties changed at this time. As of December 12, 2002, Petitioner knew or reasonably should have known that she had work-related, bilateral CTS in which surgery would be needed unless her job duties changed. December 12, 2002 is accordingly the manifestation date of Petitioner's injury.

Here, unlike the claimant in *Durand*, Petitioner actually sought medical treatment for her condition of ill-being on December 10, 2002, after a worsening and progression of her CTS symptoms. Also unlike the claimant in *Durand*, there is not sufficient evidence that Petitioner's condition of ill-being changed appreciably between December 10, 2002 and Petitioner's claimed manifestation date of March 15, 2011, so that the Arbitrator could say that Petitioner was forced to wait until the later date to file a viable claim or to determine if she actually required medical attention. Further, the diagnosis in December 12, 2002 was related to specific work activities, and Petitioner would have known this fact at that time. She consistently reported her job duties to Dr. Bergman, and Dr. Bergman in fact noted her worsening bilateral CTS to be work related on this date.

Furthermore, while Petitioner testified that her job duties increased to a point where medical treatment for her bilateral CTS was necessitated in 2010 when her boss left Respondent's employment, the record shows that Petitioner's symptoms had already progressed to a level where surgery was needed by late 2002. In fact, on March 15, 2011 (Petitioner's claimed manifestation date), when Dr. Borowiecki was discussing risks inherent in the surgeries he eventually performed, he also noted that the risks were especially present concerning the right side, as Petitioner's symptoms had been present for so long at that point. The record therefore contains ample evidence to not credit Petitioner's testimony that it was only in 2010 that her symptoms progressed and worsened to the point of necessitating medical treatment. In light of the foregoing, the Arbitrator finds that Petitioner's injuries do not escape statute of limitations application.

Even if the Arbitrator were to find that December 10, 2002 was not the manifestation date, Petitioner's injuries would have manifested themselves for purposes of the Act on January 24, 2008, when Petitioner was seen by Dr. Borowiecki. On that date, Petitioner reported increasing CTS symptoms, and that she would suffer said symptoms at work while typing on the keyboard and engaging in some of the other activities in her job in the computer room. Dr. Borowiecki even noted on this date that, "Unfortunately, it does not sound like she has actually filed this as a workman's comp claim." Dr. Borowiecki reported on January 24, 2008 that he would proceed with surgery if Petitioner could get approval. However, the CTS surgeries would have had to occur after Petitioner's 2008 hip surgery. Dr. Borowiecki testified that he did not hear from Petitioner for the intervening three years following Petitioner's hip surgery in 2008. Again, assuming *arguendo* that the manifestation date was not December 12, 2002, the date would be set at January 24, 2008, when Petitioner's CTS symptoms had progressed to the point where Dr. Borowiecki wanted to proceed with surgery and it was clearly recorded that Petitioner's job activities were aggravating her symptoms.

Accordingly, given a manifestation date of December 12, 2002 and the fact that Petitioner did not file an application for adjustment of claim with the Illinois Workers' Compensation Commission until May 23, 2012 (see PX 1), Petitioner's claim is barred by the statute of limitations pursuant to Section 6(d) of the Act. See 820 ILCS 305/6(d). Assuming a manifestation date of January 24, 2008, as discussed *supra*, would still bar Petitioner's claim under Section 6(d) of the Act. For the foregoing reasons, Petitioner has thus not proven that she sustained a compensable accident that arose out of and in the course of her employment with Respondent manifesting itself on March 15, 2011.

Issue (F): Is Petitioner's current condition of ill-being causally related to the injury?;

Issue (J): Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?;

Issue (K): What temporary benefits are in dispute? (TTD); and

Issue (L): What is the nature and extent of the injury?

Based on the foregoing findings concerning accident and the date of accident, the Arbitrator therefore finds that Petitioner's current condition of ill-being is not causally related to a timely-filed claim for a work injury. Accordingly, no medical expenses, temporary benefits or permanent partial disability benefits are awarded.

Issue (O): Is Respondent's Exhibit 5 admissible?

Respondent's Exhibit 5 is an article from a medical journal entitled "The Quality and Strength of Evidence for Etiology: Example of Carpal Tunnel Syndrome." Petitioner objected to the admission to Respondent's Exhibit 5 based upon the fact that it is hearsay. Under Illinois law, scientific and medical treatises are hearsay and are inadmissible. *Lewis v. Stoval,* 272 Ill. App. 3d 467, 470, 650 N.E.2d 1074 (3d Dist. 1995). Accordingly, Petitioner's objection to Respondent's Exhibit 5 is sustained and Respondent's Exhibit 5 is not admitted into evidence.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

STEVE STUART,

Petitioner,

vs.

NO: 05 WC 39875

14IWCC0276

CITY OF CHICAGO,

Respondent,

DECISION AND OPINION ON §19(h) AND §8(a) PETITION

This case comes before the Commission on Petitioner's §19(h) and §8(a) Petition, which was filed on November 3, 2009, alleging a material increase in his disability resulting in permanent and total disability and claiming additional medical expenses following the previous Commission §8(a) hearing, which was held on June 10, 2008. A hearing on the current petition was held before Commissioner DeVriendt on February 1, 2013, in Joliet, Illinois and a record was made.

The Commission, having considered the entire record, finds that Petitioner has failed to prove that he is entitled to additional medical expenses and permanency benefits and hereby denies his petition.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1) The original arbitration was heard on March 21, 2007. A decision was issued on May 4, 2007, finding that Petitioner sustained accidental injuries arising out of and in the course of employment on July 11, 2005, and was entitled to $101.00 in medical expenses and permanency of 6% for the loss of use of the person as a whole. There were no findings of fact or conclusions of law included in the decision.
2) On Review, the Commission issued a decision on November 6, 2007, increasing the permanency award to 12% loss of use of the person as a whole based on the August 5,

2005 lumbar MRI report, Dr. Mirkovic's surgical recommendation, and Petitioner's "credible testimony concerning his ongoing complaints and limitations."

3) Petitioner filed a §19(h)/§8(a) petition on March 3, 2008, and a hearing was held on June 10, 2008. However, in his brief, Petitioner had requested that a decision only be made on the §8(a) petition and essentially withdrew the §19(h) petition. The majority found that Petitioner testified that he was still working as a truck driver for Respondent and had not lost any time from work between his July 11, 2005 accident and the original March 21, 2007 hearing. However, he had been off work since December 7, 2007 per Dr. Martin's orders. He testified that, since the arbitration hearing, his hip pain had worsened and he was experiencing "unbearable" back pain every waking hour and rated his current hip and back pain a 10/10. Petitioner had also been seeing Dr. Martin for chronic obstructive pulmonary disease (COPD). Petitioner also continued his treatment with Dr. Egwele who performed a left sacroiliac injection and prescribed cold packs and therapy. At the last visit on May 23, 2008, Dr. Egwele noted improvement and told Petitioner to continue losing weight, exercising, and attending therapy.
4) The Commission issued a decision on May 27, 2009, in which the majority found that there was a causal connection between Petitioner's work injury and his need for additional medical care but denied additional temporary total disability (TTD) because "the opinions expressed in the [leave of absence certificates by Dr. Martin] are unsupported by examination findings and it is clear that the doctor attributed Petitioner's disability to [COPD] as well as ongoing back pain." (5/27/09 Decision at 7). The Commission also found that Dr. Egwele's records contained no mention of the need for work restrictions and, instead, documented consistent improvement during the periods that Dr. Martin was keeping Petitioner off work. (Id.) The dissenting Commissioner stated that she would have also denied the additional medical expenses because of a lack of causal connection opinion from a physician and Petitioner's vague testimony. She believed that the inconsistencies in the medical records undermined Petitioner's credibility.
5) Petitioner filed another §19(h)/§8(a) petition on November 3, 2009, which is the currently pending petition, but it was not heard until February 1, 2013.
6) The first record in evidence after the last hearing is an August 11, 2008, letter from Dr. Martin indicating that Petitioner was being treated for chronic back pain, ruptured disc, and COPD and that Petitioner was not able to resume his normal duties as a truck driver for Respondent. On December 1, 2008, Dr. Martin completed an FMLA form indicating that Petitioner's condition was "permanent" and was "unable to perform work of any kind." Petitioner was receiving therapy, Vicodin, and Flexeril at that time. On April 16, 2009, Dr. Martin referred Petitioner to Dr. Watson for pain management.
7) Petitioner first saw Dr. Artelio Watson on May 1, 2009. This record indicates that Petitioner had returned to work after his 2005 accident but then was involved in another work-related motor vehicle accident in 2007 that caused an exacerbation of his back pain. Petitioner complained to Dr. Watson of constant back pain, bilateral lower extremity paresthesias, and charley horse spasms that occur at night approximately two times per week. On examination, Dr. Watson noted that sitting caused Petitioner too much

discomfort and he had decreased lumbar range of motion in all directions. He had positive straight-leg-raise test bilaterally and was tender to palpation over the left sacroiliac joint.

8) Over the course of the next year and a half, Petitioner underwent conservative treatment including epidural steroid injections, bilateral sacroiliac joint injections, and trigger point injections. Dr. Watson testified that he didn't give Petitioner off-work slips because he was already off work. On December 7, 2009, Dr. Watson recommended an MRI and orthopedic evaluation to see if surgery was warranted. He also wrote that Petitioner "appears to be totally disabled due to the fact that his sleep is impaired and his sitting/walking tolerance are significantly declined."
9) During this time, Petitioner continued treating with his primary care physician Dr. Martin who gave Petitioner updated F.M.L.A. forms indicating that he could not perform his normal job duties.
10) Throughout 2010, Dr. Watson continued Petitioner on various meds and continued to recommend an MRI and orthopedic/neurosurgical consult. Ultimately, on November 5, 2010, he wrote that Petitioner had reached maximum medical improvement from a conservative standpoint but he was still temporarily totally disabled unless there was a surgical option available to him. On December 13, 2011, Dr. Watson opined that Petitioner was permanently disabled. As of the last visit on June 1, 2012, Dr. Watson noted that Petitioner had low back pain worse on the left with intermittent unpredictable spasms in the back and legs along with lower extremity paresthesias. Dr. Watson noted that Petitioner obtained relief (down to 6 to 7 out of 10 pain) with medications. Dr. Watson indicated that Petitioner should "refrain from work" but he could still possibly benefit from surgery.
11) On August 10, 2010, Petitioner was examined by Respondent's Section 12 orthopedic surgeon, Dr. Frank Phillips, who found that there was no spinal contraindications to Petitioner working in some capacity and he recommended a 25-pound lifting limit and to avoid repetitive bending. After reviewing Petitioner's MRIs and medical records, he opined that it did not appear that Petitioner sustained any structural injury in 2005 and that the subsequent 2010 MRI showed degenerative age-related changes only. He felt that those could be responsible for Petitioner's pain complaints but they were not related to any specific work injury or trauma.
12) Dr. Watson testified on March 25, 2011, almost two years prior to the most recent hearing, that Petitioner's exam findings have been similar throughout his treatment and that Petitioner was at maximum medical improvement from a conservative standpoint. He didn't recall if Petitioner told him about the level of work that his job with Respondent demanded. He felt that Petitioner was disabled due to his inability to sleep, difficulty sitting, and decreased lumbar range of motion. He believed that Petitioner's history and exam were consistent with low back trauma. Dr. Watson did not agree that Petitioner's low back condition was solely related to degenerative changes. The extent of his causation opinion was that Petitioner's injuries "could" be a result of his work injury. Dr. Watson testified that he was never suspicious of any malingering or symptom magnification. On cross-examination, Dr. Watson admitted that he relies on the

radiologist's and orthopedic doctor's interpretations of the MRI films since he is not a surgeon. He did not have any prior medical records to compare and there was no way for him to tell if Petitioner's anatomic condition had progressed over the course of treatment. He admitted that he did not know what the physical requirements of Petitioner's job were.

13) Respondent's Dr. Phillips testified that Petitioner's original 2005 MRI was "relatively normal" and that the 2010 MRI was similar but showed progressive degeneration that was not very severe. He did not believe the degeneration was related to either of Petitioner's work incidents (2005 or 2007). He testified that Petitioner had "a couple" of Waddell signs but that symptomatic treatment for his current complaints was reasonable although not related to Petitioner's work injuries. He disagreed with any recommendation for surgery and opined that Petitioner should, at the very least, be able to work with 25-pound restrictions but, again, this was not related to any work injuries. He stated that Petitioner could possibly work at a higher level and a functional capacity evaluation might be helpful. Dr. Phillips opined that Petitioner had reached maximum medical improvement from the work injuries in 2007.
14) Petitioner testified that he is 65 years old, is 5'7" tall, and weighs 225 pounds, which is the same as he weighed at the time of original accident on 7/11/05. He has been an employee with Respondent since 1978 as a motor truck driver.
15) Petitioner testified that he continued seeing Dr. Watson for problems with sleeping due to sudden vicious crippling pain that encompasses both legs, in which the muscles swell up and he is "paralyzed" for 10 or 15 minutes. This happens at least once every 6 weeks. Petitioner testified that he has slept on the dining room floor for almost three years so he can avoid kicking the furniture and not hurt his foot when the pain strikes. Petitioner testified that he wakes up every morning with pain, which increases as the medication wears off. He takes medication three times a day, which helps "very much" with the pain. The injections have also helped.
16) Petitioner testified that if he doesn't take the medications, his back feels as though it is "wedged" or out of place. The lower back and upper back don't feel aligned and the hip becomes bulged. He feels as though something is out of place and subsequently it will go back in place. Petitioner testified that the pain today is in the same area as the time of the accident and that prior to the accident he had no pain in his back or left leg. Petitioner testified that he has had constant low back pain and has taken pain medications since he's been injured. He has to change positions often and cannot stand or sit for extended periods of time. He avoids bending and making sudden movements. He has difficulty tying his shoes.
17) Petitioner testified that he has not returned to work for Respondent because he doesn't feel like he is able to and he is following Dr. Watson's orders. However, Petitioner then had the following exchange with his attorney:

Q: Now bring you up-to-date, I want you to recall all of the kinds of activities

that you did as a truck driver for [Respondent]. Sitting here today, how much time would you be sitting behind the wheel of a truck driving during the course of an eight-hour day as a truck driver?

A: Eight hours in a regular day.
Q: Of the eight hours, how many of those hours would actually be sitting driving the truck?
A: Well, it would be maybe four hours, maybe.
Q: With the condition of your back, are you able to do that?
A: I would.
Q: Pardon me?
A: I would.
Q: Are you able to do it now with the condition of your back?
A: I would.
Q: Right now, are you able to sit behind a truck and drive it for eight hours a day?
A: Not right at this minute.
Q: What would you have to do to be able to sit behind the truck and drive...
A: Well, I would have to drive the truck to the –
Q: -- as you did at the time of the accident?
A: -- location as though, which is normally what you do. You get a location. You drive, when I reach that location then I have to get out and pace around the truck and get back in when I have to move it.
Q: And my question to you is, are you physically capable of doing that today with the condition of your back?
A: Yes, I could do that.
Q: You could return?
A: I could but I am saying I am not going to be able to drive non stop eight hours. I have to stop in between.
Q: Can you drove [sic] the truck with the medication you are on?
A: No. I would have to cut down on the medication.
Q: And if you cut down on the medication, what would happen?
A: Well, then I would be on a different medication maybe that is not as strong as what I am taking.
Q: Do you know if there is different medication that would control your pain?
A: That I don't know.
Q: Would you like to return to work for [Respondent]?
A: Yes, I would.
Q: Has your doctor indicated you are able to go back to work for [Respondent]?
A: Not at this point.

T.28-31 (Emphasis added.)

18) On cross-examination, Petitioner testified that he let his driver's license expire in 2007 and has not renewed it. Petitioner testified that he initially treated with Dr. Egwele until he was released to full duty in May 2006. He returned to Dr. Egwele in November 2007 and treated with him in 2008 but had not returned since. He also had not returned to see Dr. Mirkovic, who had initially recommended surgery, since the first hearing.
19) Kari Stafseth, a certified rehabilitation counselor at Vocamotive, testified that she met with Petitioner on September 21, 2011, and reviewed his history and records. She testified that, based on the opinion of Dr. Watson, Petitioner was totally disabled. However, if Dr. Phillips' opinion was accurate, then Petitioner was prospectively employable at the light demand level earning $9 to $11 per hour as a security guard, cashier, or in customer service. Ms. Stafseth stated that she did not have a formal description of Petitioner's job with Respondent but used the Dictionary of Occupational Titles to determine that it was a medium physical demand level job. She admitted that Petitioner's job duties could vary from that and he did not tell her the length of time that he drove per day. She did not have any information regarding the lifting requirements. Petitioner reported to her that he did some supervisory duties when he filled in when the superintendent was out but she didn't know how much time that would have taken in his work day. Ms. Stafseth admitted that if Petitioner's physical capabilities allowed him to drive a truck, then having a commercial driver's license would expand the range of his employment opportunities but Petitioner had let his expire.
20) Jacqueline Bethell from MedVoc also interviewed Petitioner and reviewed his records at the request of Respondent on January 23, 2013. She reported that Petitioner's job involved driving a truck but not loading/unloading materials. Ms. Bethel stated that Petitioner indicated to her that he has not looked for alternate work since sustaining his injury in 2005 but told her that he believed he could return to work. He also indicated he believed he could start weaning off of his current medication. Ms. Bethell concluded that, based on Petitioner's description of his job tasks and Dr. Phillips' restrictions (25-pound lifting and no repetitive bending), Petitioner may be able to return to his regular job with Respondent without modification if he had his commercial driver's license reissued.

The Commission notes that, instead of returning to his previous treating physicians (Dr. Mirkovic and Dr. Egwele) and getting further treatment and off-work notes from them, Petitioner began treating with Dr. Watson, a physiatrist and pain management doctor, who opined that he was temporarily and, ultimately, permanently disabled even though, according to Respondent's orthopedic surgeon Dr. Phillips, there is no anatomic reason why Petitioner would be unable to at least perform light duty work. We find that Dr. Watson's opinion that Petitioner's current injuries "could be" a result of his original work-related injury is not persuasive on the issue of causal connection. We note that the Commission has previously denied additional temporary total disability because it was unsupported by examination findings and was partly due to Petitioner's COPD.

The Commission finds that Petitioner's testimony indicates that he believes he could return to his former job and he might be able to modify his medications to ones that could relieve

his symptoms and allow him to drive. The Commission notes that Petitioner let his driver's license expire in 2007 so part of the reason he is unable to return to his job is of his own doing. The last record from Dr. Watson is from June 1, 2012 (approximately 8 months prior to the hearing) and Dr. Watson testified on March 25, 2011 (almost two years prior). As such, we find that his opinion does not accurately reflect Petitioner's current condition since it is inconsistent with his testimony at hearing and also what Petitioner told Ms. Bethel on January 28, 2013, regarding his belief that he could return to work. Therefore, we find the opinion of Dr. Phillips more credible regarding causal connection and Petitioner's ability to work than Dr. Watson's.

We further find the opinion of Jacqueline Bethell from MedVoc to be credible that Petitioner could return to his previous employment with Respondent if he obtained a commercial driver's license.

We find that Petitioner's complaints at the current hearing are not materially different than the ones he had at the original hearing. Based on the record as a whole, including Petitioner's testimony at the various hearings, the medical evidence and opinions, and the previous Commission decisions, we find that Petitioner has failed to prove that his current condition of ill-being is causally related to his work injury on July 11, 2005. As such, we find that Petitioner has failed to prove that his outstanding medical expenses are causally related and also that he failed to prove that he has sustained a material increase in his disability.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's Petition under §19(h) and §8(a) is hereby denied.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 14 2014

Charles J. DeVriendt

Michael J. Brennan

Ruth W. White

SE/
O: 2/19/14
49

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WINNEBAGO

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

EVERETT LEE BRADLEY,

Petitioner,

vs. NO: 08 WC 09011

SUPERIOR DRYWALL COMPANY,

14IWCC0277

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of temporary total disability benefits, maintenance benefits and permanent partial disability benefits, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Arbitrator found that Petitioner sustained an accident arising out of and in the course of his employment and that Petitioner's current condition of ill being is causally connected to Petitioner's injury. In addition to temporary total disability and maintenance benefits, the Arbitrator awarded Petitioner a wage differential of $779.60 per week commencing October 1, 2012, through the duration of his disability because the injuries sustained cause a loss of earnings as provided in Section 8(d)(1) of the Act. We reverse the Arbitrator's decision with respect to his permanency findings. The Commission holds that Petitioner is not entitled to a wage differential. Instead, we award Petitioner 50% loss of the person as a whole as provided in Section 8(d)(2).

We find that Petitioner did not prove he is entitled to a wage differential. Instead, given Petitioner's injuries, change in occupation and reduced wages, Petitioner is entitled to permanent

partial disability benefits of 50% loss of the person as a whole. Petitioner did not meet his burden of proving his current average weekly wage if he were working full duty, which is necessary for a wage differential award. Petitioner did not present documentation of the hours he worked when fully performing his job as a plasterer prior to the injury, or the hourly rate of pay that he earned at that time. Reviewing the evidence and testimony of Art Strums, Business Agent for Local 11 Cement Masons and Plasterers, shows that Petitioner was not guaranteed 40 hours of employment per week. The hours a full duty plasterer would work in a given week depended on weather, strikes and availability of work, among other factors. The average hours Petitioner worked as a full duty plasterer cannot be determined based on the evidence and testimony presented during the arbitration hearing. Any calculation of Petitioner's current average weekly wage if he was still employed full duty as a plasterer would be purely speculative and not supported by the record. Therefore, Petitioner did not establish that he is entitled to a wage differential under Section 8(d)(1).

Petitioner had various methods by which he could have established a wage for a full time plasterer. One such method was the introduction of the wages of a like employed plasterer at the time of the hearing. Another would involve the production of records, such that they would establish the average number of hours that all union plasterers work during the calendar year.

Without such information, the Commission would be required to speculate, as was done by Petitioner's Business Agent, Art Strums. Neither the arbitrator nor the Commission has the legal capacity to speculate regarding wages, available hours or the income that a like employed person might earn. Absent such evidence, such a finding is without merit.

Additionally, Respondent filed a motion on January 13, 2014, to Present Additional Evidence and Continue Oral Argument. Respondent argued that it has received additional video evidence indicating that Petitioner is able to return to his previous line of work and requested an updated Section 12 exam. Respondent states this evidence was not available until several months after the arbitration hearing.

The Act does not allow parties to introduce additional evidence into the record after the arbitration hearing. Section 19(e) of the Act states, in relevant part, "[i]n all cases in which the hearing before the arbitrator is held after December 18, 1989, no additional evidence shall be introduced by the parties before the Commission on review of the decision of the Arbitrator." The Act does not allow additional evidence to be introduced in any circumstance. Therefore, we deny Respondent's "Motion to Present Additional Evidence and Continue Oral Argument."

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision is modified as stated herein.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent's "Motion to Present Additional Evidence and Continue Oral Argument" is hereby denied.

14IWCC0277

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $663.67 per week for a period of 142-6/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $663.67 per week for a period of 125-4/7 weeks for maintenance benefits under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $597.30 per week for a period of 250 weeks, as provided in §8(d)(2) of the Act, for the reason that the injuries sustained caused the permanent partial disability of 50% person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 15 2014
TJT: kg
O: 2/11/14
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BRADLEY, EVERETT
Employee/Petitioner

Case# **08WC009011**

SUPERIOR DRYWALL
Employer/Respondent

14IWCC0277

On 1/3/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.12% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0118 ALLEGRETTI & ASSOCIATES
JAMES ALLEGRETTI
617 W DEVON AVE
PARK RIDGE, IL 60068

2461 NYHAN BAMBRICK KINZIE & LOWRY PC
THOMAS J MALLERS
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

14IWCC0277

STATE OF ILLINOIS)
)SS.
COUNTY OF MC HENRY)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Everett Bradley
Employee/Petitioner

Case # **08** WC **9011**

v.

Superior Drywall
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **Rockford**, on **November 14, 2012.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☒ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other

14IWCC0277

FINDINGS

On **October 27, 2006**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being *is* causally related to the accident.

In the year preceding the injury, Petitioner earned $**51,766.00**; the average weekly wage was $**995.50**.

On the date of accident, Petitioner was **40** years of age, ***single*** with **1** dependent child.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit for TTD, maintenance, and other benefits, actually paid.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $**663.67**/week for **142 6/7** weeks, commencing **February 20, 2007** through **June 25, 2007**, and from **December 12, 2007** through **May 4, 2010** as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from **October 27, 2006** through **November 14, 2012**, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit for temporary total disability benefits that have been paid.

Respondent shall pay Petitioner maintenance benefits of $**663.67**/week for **125 4/7** weeks, commencing **May 5, 2010** through **September 30, 2012**, as provided in Section 8(a) of the Act. Respondent shall be given a credit for maintenance benefits that have been paid.

Respondent shall pay Petitioner permanent partial disability benefits, commencing **October 1, 2012**, of $**779.60**/week for the duration of the disability, because the injuries sustained caused a loss of earnings, as provided in Section 8(d)1 of the Act.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Arbitrator Anthony C. Erbacci

December 27, 2012
Date

JAN 3 - 2013

FACTS:

On October 27, 2006, the Petitioner was employed by the Respondent as a journeyman plasterer. The Petitioner testified that he did not complete high school prior to becoming a plasterer and that he has worked as a plasterer from the age of 18 until his injury on October 27, 2006. The Petitioner testified that, at the time of his injury, he was a skilled ornamental plasterer and was one of only three skilled ornamental plasterers in the state of Illinois. The Petitioner testified that as one of the only three skilled ornamental plasterers in the state, he was always fully employed. Art Sturm, a Mason's and Plasterer's Union representative, testified the best plasterers would always have work and that the Petitioner was always fully employed. He further testified that fully employed plasterers regularly work 40 hours per week and that the base rate for a journeyman plasterer is currently $33.36 per hour.

The Petitioner testified that on October 27, 2006, he was working for the Respondent as a plasterer and that he was working with an apprentice plaster on a scaffold. The Petitioner testified that the apprentice slipped and he attempted to grab the apprentice, and a bucket of "mud", to prevent the apprentice from falling to the ground. The Petitioner testified that he then experienced severe pain in his low back which brought him to his knees and made it difficult to stand up. The Petitioner testified that he ultimately climbed down from the scaffold he told his foreman what had happened. He also testified that he called his Union business agent and told him as well. The Petitioner testified that he then went to a medical clinic for treatment that day.

The Petitioner testified that he first treated at the Medcare Health Center on the day of the injury and that he was taken off work at that time. The medical records demonstrate that the Petitioner saw Dr. Madhuri Yemul and that, on January 17, 2007, the Petitioner underwent a lumbar MRI which was reported to demonstrate multilevel disk disease with disc protrusions at L4-5 and L5-S1.

The Petitioner then came under the care of Dr. Christopher Sliva at the Rockford Spine Center. The Petitioner testified that he was referred to Dr. Sliva, an orthopedic surgeon, by Dr. Yemul. His first visit to Dr. Sliva was on February 20, 2007. Dr. Sliva's records indicate that the Petitioner reported a work injury on October 27, 2006 and gave a history of injury consistent with his testimony at hearing. The Petitioner reported the immediate onset of back pain which gradually continued to worsen and the development of left sided buttock and posterior thigh pain. Dr. Sliva's impression was L4-5 and L5-S1 degenerative disc disease with disc protrusions and lateral recess stenosis with radiculopathy, and he recommended the Petitioner undergo epidural steroid injections along with physical therapy. Dr. Sliva also noted that surgical options were possible if the Petitioner's symptoms did not improve with the steroid injections and physical therapy. Dr. Sliva prescribed the Petitioner off work pending epidural steroid injection.

The Petitioner returned to Dr. Sliva on May 2, 2007 after having undergone three epidural steroid injections and eight weeks of physical therapy. The Petitioner reported that

while the epidural steroid injections had improved his leg pain he still had episodic left-sided buttock, posterior thigh, and calf pain as well as right-sided buttock pain. Dr. Sliva continued the Petitioner off work and prescribed another month of work hardening. On June 19, 2007, Dr. Sliva released the Petitioner to attempt to return to full duty work as of June 25, 2007. The Petitioner testified that his attempt to return to work was delayed for a time but that he did return to work in October of 2007. He testified that he worked for three to four weeks and was then taken off work again in November 2007.

At the request of the Respondent, the Petitioner was seen and examined by Dr. Anthony Rinella on September 13, 2007. Dr. Rinella noted the Petitioner history of a work injury and his course of treatment to that point. Dr. Rinella opined that, "as a direct result of the work related incident" the Petitioner had a lumbar strain and left L5 radiculopathy. Dr. Rinella indicated that the Petitioner had "maximized conservative management" and could attempt to return to full duty work. Dr. Rinella further opined that should the attempt to return to work fail, a two level decompression and fusion would be in the Petitioner's best interest.

The Petitioner returned to Dr. Sliva on December 12, 2007 complaining of a recurrence of his left leg pain. Dr. Sliva ordered a repeat MRI which was performed on December 12, 2007 and was reported to reveal a broad-based disc herniation at L4-5 and an annular tear at L5-S1. Dr. Sliva and the Petitioner decided to proceed with surgery and Dr. Sliva ordered a pre-operative stress test and a repeat MRI.

In a letter report dated September 2, 2008, Dr. Rinella opined that the repeat MRI of the Petitioner's spine and the pre-operative stress test was reasonable. Dr. Rinella further opined that the L4–S1 posterior fusion recommended for the Petitioner was necessary to treat the Petitioner's left L5 radiculopathy and discogenic pain which was related to the Petitioner's work injury.

On January 12, 2009, the Petitioner underwent the pre-surgery stress echocardiogram and on January 19, 2009, the Petitioner underwent a repeat lumbar MRI. On February 5, 2009 the Petitioner underwent an L4–S1 decompression and fusion with instrumentation and bone grafting which was performed by Dr. Sliva. Following the surgery the Petitioner underwent a course of physical therapy but he continued to have complaints of low back pain.

At the request of the Respondent, the Petitioner was examined by Dr. Avi Bernstein on December 7, 2009. Dr. Bernstein noted the Petitioner's history of a work related injury on October 27, 2006 followed by conservative treatment and then surgery. Dr. Bernstein also noted the Petitioner's continuing complaints of low back pain. Dr. Bernstein opined that the Petitioner suffered a work related incident on October 27, 2006 which resulted in an aggravation of a pre-existing degenerative condition and a lumbar disc herniation. Dr. Bernstein further opined that the Petitioner required further work up to confirm that the spinal fusion had healed and had otherwise reached maximum medical improvement. Dr. Bernstein indicated that a functional capacity evaluation would be appropriate to determine the Petitioner's full functional abilities.

In a subsequent letter report dated January 20, 2010, Dr. Bernstein reported that he had reviewed additional medical records and Dr. Sliva's opinions and he opined that the Petitioner had a failed fusion. Dr. Bernstein indicated that the Petitioner's options were to live with his condition and accept light duty restrictions, or undergo surgery to reconstruct the fusion.

On April 6, 2010, the Petitioner underwent a functional capacity evaluation. The results of the evaluation were considered valid, with the Petitioner demonstrating consistent maximal effort, and were reported to demonstrate that the Petitioner was capable of working at the light-medium level. On May 4, 2010, Dr. Sliva noted the results of the functional capacity evaluation and concluded that the Petitioner was prevented from returning to his regular work. Dr. Sliva further concluded that the Petitioner had reached maximum medical improvement and should follow up on a p.r.n. basis. The Petitioner testified that he has not returned to Dr. Sliva since that date.

Following his release by Dr. Sliva, the Petitioner began a course of vocational rehabilitation with Vocamotive. The Petitioner testified that following the commencement of vocational rehabilitation, he was incarcerated for six months and then was released to a work release program. He testified that during the period of his work release, he took G.E.D. classes, learned keyboarding and basic software skills, and did a job search in accordance with the instructions of the Vocamotive counselors. The Petitioner testified that he started he started his actual job search in July of 2011 and that he made 20 to 30 contacts per week and had a couple of job interviews. The Petitioner testified that he eventually found a job on his own working as a handy man, performing building maintenance, 20 hours per week at $8.25 per hour. The Petitioner testified that he started that job on October 1, 2012.

CONCLUSIONS:

In Support of the Arbitrator's Decision relating to (C.), Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds and concludes as follows:

The Petitioner credibly testified that on October 27, 2006, he was working for the Respondent as a plasterer and that he was working with an apprentice plaster on a scaffold. The Petitioner testified that the apprentice slipped and he attempted to grab the apprentice, and a bucket of "mud", to prevent the apprentice from falling to the ground. The Petitioner testified that he then experienced severe pain in his low back which brought him to his knees and made it difficult to stand up. The Petitioner testified that he ultimately climbed down from the scaffold and he told his foreman what had happened. He also testified that he called his union business agent and told him as well. The Petitioner testified that he then went to a medical clinic for treatment that day.

On January 17, 2007, the Petitioner underwent a lumbar MRI which was reported to demonstrate multilevel disk disease with disc protrusions at L4-5 and L5-S1. The Petitioner then came under the care of Dr. Christopher Sliva on February 20, 2007. Dr. Sliva's records indicate that the Petitioner reported a work injury on October 27, 2006 and gave a history of injury consistent with his testimony at hearing. The Petitioner reported the immediate onset of back pain which gradually continued to worsen and the development of left sided buttock and posterior thigh pain. Dr. Sliva's impression was L4-5 and L5-S1 degenerative disc disease with disc protrusions and lateral recess stenosis with radiculopathy, and he recommended the Petitioner undergo epidural steroid injections along with physical therapy. Dr. Sliva also noted that surgical options were possible if the Petitioner's symptoms did not improve with the steroid injections and physical therapy.

Although no records of the Petitioner's initial medical treatment were offered into evidence, the Petitioner's testimony was credible and was supported by the histories contained in the records of the Petitioner's subsequent medical treatment. No witnesses were called by the Respondent, and the Petitioner's testimony was not contradicted or impeached. Based upon the credible, uncontradicted, testimony of the Petitioner and the histories contained in the medical records, the Arbitrator finds that the Petitioner sustained his burden of proving by a preponderance of the credible evidence that an accident arising out of and in the course of his employment occurred.

Based upon the foregoing, and having considered the totality of the credible evidence adduced at hearing, the Arbitrator finds that on October 27, 2006, an accident occurred which arose out of and in the course of the Petitioner's employment by the Respondent.

In Support of the Arbitrator's Decision relating to (F.), Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds and concludes as follows:

The Arbitrator's findings and conclusions relating to the issue of accident are adopted and incorporated herein.

The Petitioner testified that he first treated for his at the Medcare Health Center on the day of the injury. The medical records demonstrate that the Petitioner saw Dr. Madhuri Yemul and that, on January 17, 2007, he underwent a lumbar MRI which was reported to demonstrate multilevel disk disease with disc protrusions at L4-5 and L5-S1. The Petitioner then came under the care of Dr. Christopher Sliva on February 20, 2007. Dr. Sliva's records indicate that the Petitioner reported a work injury on October 27, 2006 and an immediate onset of back pain which gradually continued to worsen and include left sided buttock and posterior thigh pain. Dr. Sliva's impression was L4-5 and L5-S1 degenerative disc disease with disc protrusions and lateral recess stenosis with radiculopathy, and he recommended the Petitioner undergo epidural steroid injections along with physical therapy. Dr. Sliva also noted that surgical options were possible if the Petitioner's symptoms did not improve with the steroid injections and physical therapy.

At the request of the Respondent, the Petitioner was seen and examined by Dr. Anthony Rinella on September 13, 2007. Dr. Rinella noted the Petitioner history of a work injury and his course of treatment to that point. Dr. Rinella opined that, "as a direct result of the work related incident" the Petitioner had a lumbar strain and left L5 radiculopathy. Dr. Rinella indicated that the Petitioner could attempt to return to full duty work but he opined that should the attempt to return to work fail, a two level decompression and fusion would be in the Petitioner's best interest. In a letter report dated September 2, 2008, Dr. Rinella opined that the L4–S1 posterior fusion recommended for the Petitioner was necessary to treat the Petitioner's left L5 radiculopathy and discogenic pain which was related to the Petitioner's work injury.

The Petitioner continued to treat with Dr. Sliva, undergoing epidural steroid injections a course of physical therapy, work hardening, and, ultimately, an L4–S1 decompression and fusion with instrumentation and bone grafting on February 5, 2009. Following the surgery the Petitioner underwent a course of physical therapy but he continued to have complaints of low back pain.

At the request of the Respondent, the Petitioner was examined by Dr. Avi Bernstein on December 7, 2009. Dr. Bernstein noted the Petitioner's history of a work related injury on October 27, 2006 followed by conservative treatment and then surgery. Dr. Bernstein also noted the Petitioner's continuing complaints of low back pain. Dr. Bernstein opined that the Petitioner suffered a work related incident on October 27, 2006 which resulted in an aggravation of a pre-existing degenerative condition and a lumbar disc herniation. Dr. Bernstein further opined that the Petitioner required further work up to confirm that the spinal fusion had healed and had otherwise reached maximum medical improvement. Dr. Bernstein indicated that a functional capacity evaluation would be appropriate to determine the Petitioner's full functional abilities.

In a subsequent letter report dated January 20, 2010, Dr. Bernstein reported that he had reviewed additional medical records and Dr. Sliva's opinions and he opined that the Petitioner had a failed fusion. Dr. Bernstein indicated that the Petitioner's options were to live with his condition and accept light duty restrictions, or undergo surgery to reconstruct the fusion.

On April 6, 2010, the Petitioner underwent a functional capacity evaluation which was reported to demonstrate that the Petitioner was capable of working at the light-medium level. On May 4, 2010, Dr. Sliva noted the results of the functional capacity evaluation and concluded that the Petitioner was prevented from returning to his regular work. The Petitioner testified that he has not returned to Dr. Sliva since that date.

The Arbitrator notes that following his work injury the Petitioner undertook a continuous course of medical treatment which culminated in a lumbar surgery and permanent work restrictions. The Respondent's examining physicians specifically opined that the Petitioner's injury and need for surgery were related to his work accident. Prior to his work injury the

Petitioner was fully employed as a journeyman plasterer, and no evidence of any subsequent intervening accidents was presented or contained in the medical records. In light of the Petitioner's credible testimony and the records and opinions of Dr. Sliva, Dr. Rinella and Dr. Bernstein, the Arbitrator concludes that the Petitioner's present condition of ill-being is causally related to the work accident.

Based upon the foregoing, and having considered the totality of the credible evidence adduced at hearing, the Arbitrator finds that the Petitioner's current condition of ill-being is causally related to the work injury of October 27, 2006.

In Support of the Arbitrator's Decision relating to (K.), What temporary benefits are due, the Arbitrator finds and concludes as follows:

The Arbitrator's findings and conclusions relating to the issues of accident and causation are adopted and incorporated herein.

The Petitioner testified that he first treated at the Medcare Health Center on the day of the injury and that he was taken off work at that time. The Arbitrator notes, however, that there is no medical documentation to support the Petitioner's absence from work prior to February 20, 2007 when he first began treatment with Dr. Sliva.

The Petitioner was taken off work by Dr. Sliva from February 20, 2007 to June 25, 2007 when he was given a full duty release. The Petitioner returned to Dr. Sliva in July, 2007 reporting additional complaints. Surgery was discussed as an option, but the Petitioner was not specifically taken off of work. On September 13, 2007, the Petitioner was examined by Dr. Rinella who found the Petitioner able to return to work until and unless he elected to undergo surgery.

The Petitioner testified that he did return to work in October of 2007. He testified that he worked for three to four weeks and was then taken off work again in November 2007.

On December 12, 2007 Dr. Sliva and the Petitioner decided to proceed with surgery and Dr. Sliva ordered a pre-operative stress test. In a letter report dated September 2, 2008, Dr. Rinella opined that the pre-operative stress test was reasonable and that the L4–S1 posterior fusion recommended for the Petitioner was necessary. The Arbitrator notes that in September 2007 Dr. Rinella had opined that the Petitioner was able to return to work *"until and unless he elected to undergo surgery"* (emphasis added). On February 5, 2009 the Petitioner underwent an L4–S1 decompression and fusion. Following the surgery the Petitioner continued under Dr. Sliva's care and remained off work. On January 20, 2010, Dr. Bernstein opined that the Petitioner had a failed fusion and that the Petitioner's options were to live with his condition and accept light duty restrictions, or undergo surgery to reconstruct the fusion.

On May 4, 2010, Dr. Sliva noted the results of the functional capacity evaluation and concluded that the Petitioner was prevented from returning to his regular work. Dr. Sliva further concluded that the Petitioner had reached maximum medical improvement.

On May 10, 2010 the Petitioner began a course of vocational rehabilitation. It was noted that the Petitioner had lost access to his usual and customary work as a plasterer and that he had attended special education classes throughout primary school and high school. During the course of his vocational rehabilitation, the Petitioner took G.E.D. classes, learned keyboarding and basic software skills, and did a job search. It was noted that, except for some period in November and December of 2011, the Petitioner maintained regular contact with the vocational counselors and was cooperative with virtually all of the vocational rehabilitation and job search efforts conducted on his behalf. The Petitioner testified that he eventually found a job on his own working as a handy man and that he started that job on October 1, 2012.

The evidence demonstrates that the Petitioner was taken off work by Dr. Sliva from February 20, 2007 to June 25, 2007 when he was given a full duty release. On December 12, 2007, Dr. Sliva and the Petitioner decided to proceed with surgery and Dr. Sliva ordered a pre-operative stress test which was delayed due to lack of authorization by the Respondent. Dr. Rinella, the Respondent's examining physician, ultimately opined that the pre-operative stress test was reasonable and that the L4–S1 fusion recommended for the Petitioner was necessary to treat the Petitioner's condition which was related to the Petitioner's work injury. On February 5, 2009 the Petitioner underwent an L4–S1 decompression and fusion and he remained disabled from work through the commencement of his vocational rehabilitation on May 10, 2010. The Petitioner continued to participate in a course of vocational rehabilitation until he started a new job on October 1, 2012.

Based upon the foregoing, and having considered the totality of the credible evidence adduced at hearing, the Arbitrator finds that the Petitioner is entitled to Temporary Total Disability benefits from February 20, 2007 through June 25, 2007, and from December 12, 2007 through May 4, 2010, a total period of 142 6/7 weeks. The Arbitrator further finds that the Petitioner is entitled to Maintenance benefits from May 5, 2010 through September 30, 2012, a period of 125 4/7 weeks.

In Support of the Arbitrator's Decision relating to (L.), What is the nature and extent of the injury, the Arbitrator finds and concludes as follows:

The Petitioner previously worked as a journeyman plasterer out of his union local. The Petitioner's permanent restrictions prevent him from returning to his prior occupation as a journeyman plasterer. Art Sturms, the business manager for Local 11, testified that the Petitioner would currently be able to earn $33.36 per hour if he were still so employed and that the normal workweek for a journeyman plasterer was 40 hours per week. While he testified that the Petitioner was not guaranteed full time employment; he also testified that the Petitioner was one of only three ornamental plasterers in the state and that there was always

work for the Petitioner. The Petitioner testified that he typically worked forty hours per week although he provided no documentation in support of that testimony.

Subsequent to his release to return to light-medium level work on May 4, 2010, the Petitioner began to participate in a vocational rehabilitation program directed by the Respondent. While participating in that program, the Petitioner eventually found a job on his own working as a handyman at Cal, Inc. The Petitioner started that employment on October 1, 2012 and he is currently earning $8.25 per hour and working 20 hours per week at that job. The Petitioner testified that his current employment with Cal, Inc. will always be a part time job.

Based on the evidence of record, the Arbitrator finds that the Petitioner, in the full performance of his former job, would earn $33.36 per hour for, on average, 40 hours a week, or $1,334.40 per week. The Petitioner is currently earning $8.25 per hour and working 20 hours per week. The Arbitrator finds that the Petitioner's current employment is suitable for the Petitioner and that the Petitioner is currently earning $165.00 per week. Deducting the Petitioner's current earnings of $165.00 per week from the $1,334.40 the Petitioner would earn in the full performance of his former job yields an earnings differential of $1,169.40. Multiplying the difference times 2/3 results in a wage differential award of $779.60 per week.

Based upon the foregoing, and having considered the totality of the credible evidence adduced at hearing, the Arbitrator finds that the Petitioner is entitled to a wage differential award pursuant to Section 8(d)1 of the Act. The Arbitrator finds, therefore, that the Petitioner is entitled to $779.60 per week beginning October 1, 2012 and for so long as his disability may last.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

KAREN BAILEY,

Petitioner,

14IWCC0278

vs.

NO: 08 WC 9216

UPS,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection and permanent partial disability and begin advised of the facts and applicable law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 29, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

14IWCC0278

DATED: APR 16 2014

MJB/tdm
O: 3/18/2014
052

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC0278

BAILEY, KAREN
Employee/Petitioner

Case# **08WC009216**

UPS
Employer/Respondent

On 5/29/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

4095 KP LAW LLC
RAJESH KAMURU
105 W ADAMS ST SUITE 2325
CHICAGO, IL 60602

2461 NYHAN BAMBRICK KINZIE & LOWRY PC
PAMELA K HARMAN
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

14IWCC0278

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

- ☐ Injured Workers' Benefit Fund (§4(d))
- ☐ Rate Adjustment Fund (§8(g))
- ☐ Second Injury Fund (§8(e)18)
- ☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Karen Bailey
Employee/Petitioner

v.

UPS
Employer/Respondent

Case # **08** WC **9216**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Barbara N. Flores**, Arbitrator of the Commission, in the city of **Chicago**, on **January 22, 2013 and March 12, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On **October 3, 2007**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident(s) as explained *infra*.

In the year preceding the injury, Petitioner earned **$20,979.21**; the average weekly wage was **$411.36**.

On the date of accident, Petitioner was **32** years of age, ***single*** with **2** dependent children. *See* AX1.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$0**.

Respondent is entitled to a credit **as agreed by the parties** under Section 8(j) of the Act. *See* Arbitration Hearing Transcripts.

ORDER

As explained in the Arbitration Decision Addendum, the Arbitrator finds that Petitioner failed to establish a causal connection between her head injury at work and any current condition of ill being or her entitlement to permanent partial disability benefits. Thus, Petitioner's claim for benefits is denied.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

May 24, 2013
Date

MAY 29 2013

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION *ADDENDUM*

Karen Bailey
Employee/Petitioner

v.

UPS
Employer/Respondent

Case # **08** WC **9216**

Consolidated cases: **N/A**

FINDINGS OF FACT

A consolidated hearing was held in four of Petitioner's cases: 08 WC 2000, 08 WC 9216, 10 WC 27277, and 11 WC 30158. The above-captioned case involves Petitioner's head injury and the only issues in dispute are causal connection and the nature and extent of Petitioner's injuries. Arbitrator's Exhibit ("AX") 1; January 22, 2013 Arbitration Hearing Transcript ("Tr. at page(s)"); March 12, 2013 Arbitration Hearing Transcript ("Tr2. at page(s)"). The parties have stipulated to all other issues. *Id.*

The medical records reflect that Petitioner went to the Clearing Clinic on October 3, 2007 and reported that she bumped her head while reaching for a box at work on October 2, 2007. Petitioner's Exhibit ("PX") 4 at 77; Respondent's Exhibit ("RX") 2. Dr. Gorovits diagnosed Petitioner with a head contusion, placed Petitioner off work for the remainder of her shift, and scheduled a follow-up appointment the following day. *Id.* Petitioner returned on October 4, 2007 reporting continued pain at a level of 7/10 and a headache. PX4 at 78. Dr. Pitsilos restricted Petitioner to light duty work with no standing/walking over 20 min. per hour and no lifting over 5 pounds. *Id.* He scheduled a follow-up appointment for the next day. *Id.*

On October 8, 2007, Petitioner returned to the Clearing Clinic and reported continued pain at a level of 7/10, one episode of vomiting with some recent nausea, and an occasional headache. PX4 at 79-80. Dr. Pitsilos ordered a CT scan of the head and maintained Petitioner's work restrictions. *Id.* Petitioner returned on October 11, 2007, reporting continued head pain at a level of 7/10. PX4 at 83. Dr. Gorovits returned Petitioner to full duty work and instructed her to return as needed. *Id.* On October 12, 2007, Petitioner reported head pain at a level of 8/10 and a pounding headache. PX4 at 85. Dr. Gorovits maintained that Petitioner could work full duty, and ordered a head MRI to rule out an acute event. *Id.*

On October 16, 2007, Petitioner returned reporting continued head pain at a level of 8/10 and her concern about being unable to obtain a head MRI. PX4 at 87-88. Dr. Gorovits maintained that Petitioner could work full duty, prescribed pain and anti-inflammatory medications, and reiterated his order for a head MRI to rule out an acute event. *Id.* Petitioner underwent the recommended brain MRI on October 18, 2007. PX4 at 90. The interpreting radiologist noted minimal right frontal and ethmoid sinus disease changes and no gross abnormalities. PX4 at 90. On October 23, 2007, Dr. Gorovits discharged Petitioner from care at the Clearing Clinic and maintained that Petitioner could work full duty without restrictions. PX4 at 91.

At trial, Petitioner testified that her complaints of headaches while she was treating for other conditions (i.e., shoulder, wrist) would probably not be contained in the medical records because she and the first doctor that she saw at the Clearing Clinic "clashed." Tr. at 36. The medical records from shortly after her injury at work on November 1, 2007 do not reflect any complaints by Petitioner of symptomatology or objective findings related to the head. PX4 at 100. At trial, Petitioner acknowledged that no medication was prescribed, but rather testified that Clearing Clinic physicians gave her ibuprofen, which she took periodically. Tr. at 37-38.

ISSUES AND CONCLUSIONS

The Arbitrator hereby incorporates by reference the Findings of Fact delineated above and the Arbitrator's and parties' exhibits are made a part of the Commission's file. After reviewing the evidence and due deliberation, the Arbitrator finds on the issues presented at trial as follows:

In support of the Arbitrator's decision relating to Issue (F), whether the Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds the following:

The medical records reflect that, while Petitioner sustained an undisputed head injury, its effects were minimal, temporary, and completely resolved in less than three weeks. Petitioner provided little testimony at trial regarding any lasting effects of the accident and the medical records do not corroborate Petitioner's claimed symptomatology regarding any continued medical treatment or symptomatology during the subsequent 5 ½ years after her injury at work. Based on the foregoing, the Arbitrator finds that Petitioner failed to establish a causal connection between any claimed current condition of ill being and her head injury at work in October of 2007.

In support of the Arbitrator's decision relating to Issue (L), the nature and extent of Petitioner's injury, the Arbitrator finds the following:

As explained above, Petitioner's failed to establish a causal connection between any current condition of ill being and her head injury at work in October of 2007. Thus, the Arbitrator finds that Petitioner failed to establish through any credible evidence that she sustained permanent disability as a result of her injury at work. Petitioner's claim for permanent partial disability benefits is denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify up	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

KAREN BAILEY,

Petitioner,

14IWCC0279

vs.

NO: 11 WC 30158

UPS,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of casual connection and permanent partial disability and being advised of the facts and applicable law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission modifies the Decision of the Arbitrator with respect to permanent partial disability only. The Commission finds that the Petitioner is entitled to seven and a half percent loss of use of the right arm as the result of her February 25, 2011 work-related injury.

IT IS THEREFORE ORDERDED BY THE COMMISSION that the Decision of the Arbitrator filed on May 29, 2013, is hereby modified as stated above, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $564.05 per week for a period of 18.975 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the loss of use of 7.5% of the right arm.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

14IWCC0279

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $10,700.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 16 2014

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

MJB/tdm
O: 3/18/2014
052

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC0279

BAILEY, KAREN
Employee/Petitioner

Case# **11WC030158**

UPS
Employer/Respondent

On 5/29/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

4094 KP LAW LLC
RAJESH KANURU
105 W ADAMS ST SUITE 2325
CHICAGO, IL 60602

2461 NYHAN BAMBRICK KINZIE & LOWRY PC
PAMELA K HARMAN
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

14IWCC0279

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

- ☐ Injured Workers' Benefit Fund (§4(d))
- ☐ Rate Adjustment Fund (§8(g))
- ☐ Second Injury Fund (§8(e)18)
- ☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Karen Bailey
Employee/Petitioner

v.

UPS
Employer/Respondent

Case # **11** WC **30158**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Barbara N. Flores**, Arbitrator of the Commission, in the city of **Chicago**, on **January 22, 2013 and March 12, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

14IWCC0279

FINDINGS

On **February 25, 2011**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident(s) as explained *infra*.

In the year preceding the injury, Petitioner earned **$40,047.89**; the average weekly wage was **$940.09**.

On the date of accident, Petitioner was **35** years of age, ***single*** with **2** dependent children. *See* AX1.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$0**.

Respondent is entitled to a credit **as agreed by the parties** under Section 8(j) of the Act. *See* Arbitration Hearing Transcripts.

ORDER

Permanent Partial Disability: Schedule injury

Respondent shall pay Petitioner permanent partial disability benefits of $564.05/week for 5.06 weeks, because the injuries sustained caused the Petitioner 2% loss of use of the right arm (elbow), as provided in Section 8(e) of the Act.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

May 24, 2013
Date

MAY 29 2013

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION *ADDENDUM*

Karen Bailey
Employee/Petitioner

v.

UPS
Employer/Respondent

Case # **11** WC **30158**

Consolidated cases: **N/A**

FINDINGS OF FACT

A consolidated hearing was held in four of Petitioner's cases: 08 WC 2000, 08 WC 9216, 10 WC 27277, and 11 WC 30158. The above-captioned case involves Petitioner's right arm injury and the only issues in dispute are causal connection and the nature and extent of Petitioner's injuries. Arbitrator's Exhibit ("AX") 3; January 22, 2013 Arbitration Hearing Transcript ("Tr. at page(s)"); March 12, 2013 Arbitration Hearing Transcript ("Tr2. at page(s)"). The parties have stipulated to all other issues. *Id.*

February 25, 2011

Petitioner testified that she returned to Dr. Atkenson in February of 2011 for treatment of a right forearm incident and that she occasionally had treatment to her shoulder, but the primary focus was the forearm. Tr. at 108. Petitioner testified that she was working the same position for Respondent while she was placing a torn package weighing approximately 50 to 60 pounds into a new box. Tr. at 129-130. The box fell on her arm and caused a big knot between the knuckles of the third and fourth digits of the right hand. Tr. at 130-131. Petitioner testified that she reported this incident to her supervisor. Tr. at 131. Petitioner testified that she never had right elbow pain before this date, that her right elbow did not pop, and that she had no issue with it catching while she moved back-and-forth. Tr. at 134, 137-130.

The medical records reflect that Petitioner went to the Clearing Clinic on February 25, 2011 and reported that she was re-boxing a package when it fell on her right arm and a metal piece on it hit her hand. PX4 at 28-31, 63-65; Tr. at 131-132. Petitioner had an x-ray which showed no fracture or dislocation. *Id.* On examination of the right elbow, Petitioner had no bruising, joint crepitus, pain with movement, swelling/pain/paresthesias with percussion over the ulnar nerve, and no subluxation of the ulnar nerve from the cubital tunnel on elbow flexion. *Id.* Petitioner did have tenderness to palpation over the lateral epicondyle, and pain over the lateral epicondyle with wrist extension against force. *Id.* Dr. Lutas diagnosed Petitioner with a right forearm contusion and right hand contusion noting that it was probably work related. *Id.* She was placed off work for the remainder of her shift, instructed her to ice the affected areas, and return to regular duty work. *Id.*

Petitioner followed up at the Clearing Clinic from February 28, 2011 through April 8, 2011. PX4 at 66-70; PX4 at 109-114. On May 24, 2011, Petitioner underwent a right elbow MRI without contrast. RX3. The interpreting radiologist noted that the MRI was unremarkable. *Id.*

Petitioner continued to work full duty until March 25, 2011 when she was restricted to lifting up to 5 lbs. with the right hand. *Id.* On March 8, 2011, a Clearing Clinic physician ordered occupational therapy for worsening symptoms. *Id*; PX6 at 8; Tr. at 134-135. On March 14, 2011, Petitioner was referred to a hand specialist. *Id*; PX4 at 66-70.

Petitioner testified that she was placed off work on April 25, 2011. Tr. at 135. Before then, Petitioner testified that she was assigned to TAW classroom again in the small sort area. Tr. at 135-136. Petitioner was peeling labels off and pulling bags off a slide. Tr. at 136. Petitioner testified that she had a 5 pound lifting restriction at this time. Tr. at 136.

On June 1, 2011, Petitioner returned to Dr. Atkenson. PX5 at 25. On examination, Petitioner had tenderness to palpation at the lateral epicondylar origin of the forearm musculature and marked antalgic weakness of the wrist and finger extensors. *Id.* He noted a "high signal at the lateral epicondylar origin of the forearm musculature" which was in contrast to Petitioner's normal MRI results which he noted was consistent with tendinopathy. *Id.* He diagnosed Petitioner with lateral epicondylitis of the right elbow and noted that the condition was work related. *Id.*

Petitioner testified that she returned to unrestricted work in November of 2011. Tr. at 137. She also testified that, in the last two years, she may have had one more injection and that she did have more physical therapy. Tr. at 109-110; *see also* PX5-PX6.

Section 12 Examination of Right Shoulder and Right Elbow – Dr. Nicholson

On September 20, 2011, Petitioner submitted to an independent medical evaluation with Dr. Nicholson for the right shoulder and elbow. PX2 at 3-5; RX4. Petitioner's right elbow examination showed no evidence of effusion, full active and passive flexion/extension/pronation/supination, no tenderness over the lateral epicondyle or radial tunnel or medial epicondyle, no evidence of ulnar nerve subluxation, and negative Tinel's sign over the cubital tunnel. *Id.*

Dr. Nicholson diagnosed Petitioner with right elbow pain of non-anatomic origin, more of a soft tissue myofascial pain that would be the primary diagnosis. *Id.* He found no evidence of a multiple crush injury to the right side with signs of thoracic outlet syndrome. *Id.* Dr. Nicholson further opined that Petitioner did not require any further medical treatment for the right elbow. *Id.* He recommended a functional capacity evaluation, indicated that Petitioner was at maximum medical improvement absent a functional capacity evaluation, and indicated that Petitioner would not be able to return to her regular job duties. *Id.*

Additional Information

On November 11, 2011, Petitioner underwent a functional capacity evaluation at Dr. Atkenson's referral. RX5. The evaluator determined that Petitioner was physically capable of performing all of the essential duties of her job. *Id.*

On November 17, 2011, Petitioner returned to Dr. Atkenson. RX10. On examination, Petitioner's right elbow showed minimal tenderness to palpation at the lateral epicondyle origin of the forearm musculature and no instability or loss of motion. *Id.* Dr. Atkenson noted that Petitioner had recently completed a functional capacity evaluation showing that she was capable of performing all of her duties at work. *Id.* He released Petitioner back to work without restrictions. *Id.*

Regarding her current right elbow condition, Petitioner testified that her elbow was fine when she came back to work and she only has a little bit of trouble with it today; every so often it will stick in place and she has to shake her elbow out and extend her arm. Tr. at 138.

ISSUES AND CONCLUSIONS

The Arbitrator hereby incorporates by reference the Findings of Fact delineated above and the Arbitrator's and parties' exhibits are made a part of the Commission's file. After reviewing the evidence and due deliberation, the Arbitrator finds on the issues presented at trial as follows:

In support of the Arbitrator's decision relating to Issue (F), whether the Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds the following:

The Arbitrator finds that Petitioner's claimed current condition of ill-being in the right elbow is related to the injury sustained on February 25, 2011. In so finding, the Arbitrator notes that Petitioner's testimony regarding her right elbow is consistent, overall, with the medical records submitted into evidence and finds the causal connection opinion of Dr. Atkenson to be persuasive given his clinical finding of a signal at the lateral epicondyle on June 1, 2011. The Arbitrator also notes that Petitioner did not testify regarding any residual symptomatology in the right hand.

In support of the Arbitrator's decision relating to Issue (L), the nature and extent of Petitioner's injury, the Arbitrator finds the following:

Based on the record as a whole—which reflects an undisputed accident at work and an injury to the right elbow resulting in the need for conservative treatment with minimal current residual symptoms in the elbow—the Arbitrator finds that Petitioner has established permanent partial disability to the extent of 2% loss of use of the right arm pursuant to Section 8(e).

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

KAREN BAILEY,

Petitioner,

14IWCC0280

vs.

NO: 08 WC 2000

UPS,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection and permanent partial disability and being advised of the facts and applicable law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 29, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $19,400.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 16 2014

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

MJB/tdm
O: 3-18-2014
052

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC0280

BAILEY, KAREN
Employee/Petitioner

Case# **08WC002000**

10WC027277

UPS
Employer/Respondent

On 5/29/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

4095 KP LAW LLC
RAJESH KAMURU
105 W ADAMS ST SUITE 2325
CHICAGO, IL 60602

2461 NYHAN BAMBRICK KINZIE & LOWRY PC
PAMELA K HARMAN
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

14IWCC0280

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

- ☐ Injured Workers' Benefit Fund (§4(d))
- ☐ Rate Adjustment Fund (§8(g))
- ☐ Second Injury Fund (§8(e)18)
- ☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Karen Bailey
Employee/Petitioner

v.

UPS
Employer/Respondent

Case # 08 WC 2000

Consolidated cases: 10 WC 27277

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Barbara N. Flores**, Arbitrator of the Commission, in the city of **Chicago**, on **January 22, 2013 and March 12, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Nature & extent, allocation of TTD, causation**

FINDINGS

On **November 1, 2007** and **July 12, 2010**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident(s) as explained *infra*.

In the year preceding the injury, Petitioner earned **$21,662.94 / $40,267.70**; the average weekly wage was **$424.76 / $932.12**.

On the date of accident, Petitioner was **32**[1] years of age, ***single*** with **2** dependent children. *See* AX2.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$6,189.50** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$6,189.50**.

Respondent is entitled to a credit **as agreed by the parties** under Section 8(j) of the Act. *See* AX2.

ORDER

Temporary Total Disability Benefits

Respondent shall pay Petitioner temporary total disability benefits of $283.17/week for 19 and 5/7th weeks, commencing January 9, 2008 through February 25, 2008 and commencing May 27, 2009 through August 24, 2009, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $621.41/week for 6 weeks, commencing September 10, 2010 through October 21, 2010, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from November 1, 2007 through March 12, 2013, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of $6,189.50 for temporary total disability benefits that have been paid.

Permanent Partial Disability: Person as a whole

Respondent shall pay Petitioner permanent partial disability benefits of $260.00/week for 62.5 weeks, because the injuries sustained caused the 12.5% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

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[1] The Arbitrator notes that, while the parties only list one age for Petitioner and there are two dates of accident involved in Petitioner's claims, her age on those dates is not in dispute. *See* AX2.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

May 24, 2013
Date

MAY 29 2013

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION *ADDENDUM*

Karen Bailey
Employee/Petitioner

v.

UPS
Employer/Respondent

Case # **08** WC **2000**

Consolidated cases: **10** WC **27277**

FINDINGS OF FACT

A consolidated hearing was held in four of Petitioner's cases: 08 WC 2000, 08 WC 9216, 10 WC 27277, and 11 WC 30158. The above-captioned cases involve Petitioner's right shoulder and the only issues in dispute are causal connection and the nature and extent of Petitioner's injuries. Arbitrator's Exhibit ("AX") 2; January 22, 2013 Arbitration Hearing Transcript ("Tr. at page(s)"); March 12, 2013 Arbitration Hearing Transcript ("Tr2. at page(s)"). The parties have stipulated to all other issues. *Id.*

November 1, 2007 – Right Shoulder

Petitioner testified she had no right shoulder pain before her November 1, 2007 accident and could freely use her right shoulder. Tr. at 46, 76.

On November 1, 2007, Petitioner was employed as a 22.3 (i.e., package handler) and injured her right shoulder while loading a bag filled with small packages inside a wall. Tr. at 40-41; *see also* Petitioner's *Exhibits generally*. Petitioner testified that she heard a pop in her shoulder and tried to continue working but had to quit after some time because her arm was hurting. Tr. at 41. Petitioner reported the injury to her supervisor. *Id.*

Petitioner testified that she was sent to the Clearing Clinic[2] and was told there that she had a shoulder strain. Tr. at 41-42. Petitioner saw Dr. Gorovits on November 1, 2007 reporting right shoulder pain at a level of 7/10. PX2 at 40; PX4 at 94-103. Petitioner's range of motion was limited secondary to pain. *Id.* Her right shoulder and right wrist x-rays were negative. *Id.* Dr. Gorovits diagnosed Petitioner with a right shoulder sprain and right wrist sprain, released Petitioner to full duty work, and scheduled a follow-up visit. *Id.*

On November 6, 2007, Petitioner went to the St. Francis Hospital emergency room. PX1 at 71-82; Tr. at 42. She provided a history and reported feeling a pop in her shoulder while loading a truck and experienced right arm pain radiating down to her fingertips after putting some packages into a wall at work. PX1 at 71, 77. The emergency room physician diagnosed Petitioner with arm pain, placed her arm in a sling, prescribed Tylenol 3 and Motrin, and she was referred to a specialist, Dr. Atkenson. PX1 at 72-76; Tr. at 42-43, 82. Later that day, Petitioner also followed up at the Clearing Clinic. PX4 at 104.

Dr. Atkenson ordered a right shoulder MRI with and without contrast, which Petitioner underwent on November 26, 2007. PX2 at 38-39, 41-42; PX7 at 5-6; Tr. at 43. The interpreting radiologist noted the following: (1) there appears to be chronic injury to the anterior inferior labrum and anterior inferior glenohumeral ligament as well as a possible focal tear of the tip of the posterior superior labrum with mild displacement as described; (2) down

[2] The parties and medical records interchangeably refer to the Clearing Clinic and the MacNeal Clinic. For the purpose of uniformity, the Arbitrator refers only to the Clearing Clinic.

sloping acromion with secondary tendinosis of the rotator cuff tendon without a rotator cuff tear; and (3) focal partial tear of the biceps tendon at the junction of the bicipital groove and the rotator cuff interval, but no complete biceps tendon tear. *Id.*

On November 29, 2007, Petitioner returned to Dr. Atkenson. PX2 at 43-44. After an examination and reviewing Petitioner's diagnostic test results, Dr. Atkenson administered an injection into the right shoulder and released Petitioner to work on a trial basis effective November 30, 2007 based on Petitioner's desire to return to work. *Id*; *see also* Tr. at 44, 84.

On December 3, 2007, Petitioner saw Dr. Atkenson reporting some improvement after her injection, but an inability to work; that is, Petitioner reported that she was happy that she could brush her hair, but she could not lift up to 70 lbs. as required at work. PX2 at 45. Dr. Atkenson diagnosed Petitioner with tendinitis of the shoulder and recommended physical therapy. *Id*; *see also* Tr. at 44, 84. He placed Petitioner off work. *Id.*

On December 27, 2007, Petitioner returned to Dr. Atkenson reporting improvement in her condition with the exception of an acute exacerbation of pain during her last physical therapy session. PX2 at 46. He kept Petitioner off work, ordered additional physical therapy, and prescribed a nonsteroidal anti-inflammatory medication. *Id*; PX3 at 31.

On January 28, 2008, Petitioner reported diminished right shoulder pain as well as diminished lifting capacity as compared to her preoperative status. PX2 at 47. Dr. Atkenson ordered additional physical therapy, continued nonsteroidal anti-inflammatory medication use, and released Petitioner to light duty work with a 25 pound lifting restriction. *Id.*

Respondent honored Petitioner's work restrictions and placed her in the "TAW classroom" through January 8, 2008. Tr. at 43. There, Petitioner testified that she watched safety videos and would generally sit there. Tr. at 82-83. Petitioner was off work from January 9, 2008 through February 25, 2008 and received temporary total disability benefits. Tr. at 44, 83-84; PX3 at 51.

Petitioner returned to work on February 26, 2008 without restrictions. Tr. at 45; *see also* PX3 at 51. Petitioner testified that her right shoulder was hurting a little bit at that point, but she could do everything with her right shoulder; she explained that she had "doable pain." Tr. at 45-47.

On cross examination, Petitioner testified that she missed or changed a couple of appointments with Dr. Atkenson in April and June of 2008. Tr. at 84. She saw Dr. Atkenson through August of 2008. PX2.

On May 1, 2008, Petitioner saw Dr. Atkenson reporting pain localized at the lateral aspect of the right upper arm. PX2 at 48. Dr. Atkenson recommended additional physical therapy, continued use of nonsteroidal anti-inflammatory medication, and allowed Petitioner to continue to work. *Id.* On June 12, 2008, Petitioner saw Dr. Atkenson reporting mild right shoulder improvement after being on vacation and not using her right arm as much. PX2 at 49; *see also* Tr. at 84-85. He recommended continued physical therapy and use of nonsteroidal anti-inflammatory medication. *Id*; PX3 at 40. On July 14, 2008, Petitioner saw Dr. Atkenson and reported swelling in the right hand and right shoulder pain while at work. PX2 at 50. He ordered additional physical therapy and allowed Petitioner to continue to work. *Id*; PX3 at 39. On August 18, 2008, Petitioner saw Dr. Atkenson reporting right shoulder popping. PX2 at 51. After an examination, he noted that Petitioner had sufficiently recovered to permit discharge from his care and to return to see him only as needed. *Id.*

Then, Petitioner followed up with physicians at the Clearing Clinic between August 30, 2008 and November 11, 2008. PX2 at 52-60; PX3 at 9-17, 19-23. During this period of time she reported sharp and throbbing right shoulder pain improved with rest and worsened during certain activities including lifting and reaching. *Id.* Petitioner's reported pain levels ranged from mild to severe (10/10) depending on activity. *Id.* The physicians prescribed various topical analgesics, anti-inflammatory medications, and cold packs, and Petitioner was allowed to work full duty. *Id.* They noted that Petitioner's condition was related to her work activities. *Id.*

On November 14, 2008, Petitioner underwent a right shoulder MRI without contrast at the request of a Clearing Clinic physician. PX2 at 61; PX7 at 4; Tr. at 86. The interpreting radiologist noted the following: (1) degenerative changes of the acromioclavicular joint present in association with lateral acromion down sloping, but no bony hook or spur was present; (2) rotator cuff tendinopathy again demonstrated without evidence of a rotator cuff tendon tear; and (3) some deformity in the posterior labrum without evidence of a discrete posterior labral tear. *Id.*

Petitioner returned to the Clearing Clinic on November 19, 2008 at which point Dr. Gorovits diagnosed her with degenerative joint disease and rotator cuff tendinopathy. PX2 at 62. He ordered steroid injections, prescribed use of a cold pack, and (while no work restrictions were imposed) Dr. Gorovits noted that Petitioner "will do no lifting per UPS Supervisor." *Id.* Petitioner continued to follow up at the Clearing Clinic through December 29, 2008. PX2 at 63-66. Petitioner testified that she continued to work full duty through end of 2008. Tr. at 86.

Section 12 Examination of Right Shoulder– Dr. Verma

On February 9, 2009, Petitioner submitted to an independent medical evaluation at Respondent's request with Dr. Verma. PX2 at 6-13, 27-34, 35-37; RX7; Tr. at 87. She completed various intake forms and Dr. Verma performed a physical examination and reviewed various treating medical records and Petitioner's job description. PX2 at 14-26. Petitioner reported intermittent episodes of pain and popping in the right shoulder to the point where she reported no longer being able to lift her arm, pain at a level of 3/10 to 8-10/10 at worst, and no significant episodes over the prior two months, but continued pain over the anterior superior shoulder. PX2 at 6-13, 27-34.

On examination of the right shoulder, Petitioner had significant pain with palpation directly over the right AC joint which reproduced symptoms, mild tenderness at the biceps groove, full active and passive range of motion, full forward elevation to 160° bilaterally external rotation at the side to 60° bilaterally, and internal rotation behind the back to approximately the L3 level bilaterally, but with associated right shoulder pain with internal rotation. *Id.* Strength testing in the right shoulder demonstrated 4/5 with abduction in the scapular plane with complaints of anterior superior shoulder pain, external rotation at 5/5, negative lift off and belly press maneuvers, and complaints of pain with behind the back position. *Id.*

Dr. Verma diagnosed Petitioner with a low grade AC joint separation with persistent AC joint pain in the right shoulder. *Id.* He noted that the separation was visible on the x-rays that he reviewed and that Petitioner's subjective complaints appeared to be consistent with his objective findings including symptom reproduction with palpation over the AC joint. *Id.* He noted no evidence of any pre-existing conditions, co-morbidities, or unrelated factors regarding Petitioner's right shoulder injury. *Id.* Dr. Verma recommended a diagnostic injection into the right AC joint and clinical follow-up with a possible arthroscopic surgery including mini-open distal clavicle excision if her pain persisted. *Id.* Ultimately, he opined that Petitioner's right shoulder condition was causally related to the November 1, 2007 accident based on the mechanism of injury, Petitioner's radiographic studies showing an injury to the AC joint, and Petitioner's persistent symptoms with significant

exacerbations associated with activity. *Id.*

Continued Medical Treatment

Petitioner testified that she injured her right shoulder again in May of 2009 and saw Dr. Atkenson in the early part of 2009. Tr. at 47-50, 79-80. She further testified that her right shoulder hurt between February 26, 2008 through the time she began seeing doctors again in the beginning 2009, and that her shoulder got worse in February of 2009. Tr. at 50-51.

The medical records reflect that Petitioner saw Dr. Atkenson on May 29, 2009 and that he diagnosed her with refractory impingement syndrome with acromioclavicular arthrosis and possible Bankart lesions by MRI with suggestive mechanism of injury. PX1 at 8. He recommended arthroscopic surgery including distal clavicle resection and possible Bankart procedure. *Id.*

Petitioner testified that, before the recommended surgery, she could hardly raise her arm, she experienced clicking and grinding, and it hurt to do anything with her right arm. Tr. at 54-55. She further testified that, while Dr. Atkenson recommended surgery, she was scared of undergoing surgery and getting cut. Tr. at 53-54, 88-89.

On June 3, 2009, Petitioner underwent surgery performed by Dr. Atkenson. PX1 at 10-11, 28-29; Tr. at 54. Preoperatively, he diagnosed Petitioner with impingement syndrome of the right shoulder with acromioclavicular arthrosis and possible labral tear. *Id.* Dr. Atkenson performed the following procedures: (1) examination under anesthesia; (2) arthroscopy of the right shoulder with extensive debridement; (3) arthroscopic subacromial decompression; and (4) arthroscopy of the right shoulder with distal clavicle resection. *Id.* postoperatively, Dr. Atkenson diagnosed Petitioner with impingement syndrome of the right shoulder with acromioclavicular arthrosis without a labral tear. *Id.*

Petitioner was discharged the same day with a shoulder immobilizer, prescription pain medication, and instructions to follow up with Dr. Atkenson. PX1 at 5, 45-46. Thereafter, Petitioner underwent physical therapy through August. Tr. at 55; PX5.

Petitioner testified that she was off work from May 5, 2009 to August 24, 2009. Tr. at 52-53. She testified that Respondent assigned her to the TAW classroom again. Tr. at 51. She did not work from May 5, 2009 through May 27, 2009 and she did not receive any workers' compensation, short term disability, welfare or health benefits. Tr. at 92. Petitioner did not use any sick or vacation time during this period either. Tr. at 92-93. Petitioner did receive workers compensation benefits beginning May 27, 2009 through August 24, 2009. Tr. at 93. Petitioner was released to full duty work without restrictions on August 13, 2009, and she returned to work on August 25, 2009. Tr. at 55-56, 66-67, 91.

Regarding her condition at the time, Petitioner testified that she felt better than she did before her surgery, but she still had "doable" pain. Tr. at 56-57. Petitioner testified that after her right shoulder surgery from August 24, 2009 through July 11, 2010, she still had pain but it was "doable." Tr. at 72-74. Petitioner also testified that she had problems with the scar on her shoulder which developed keloid. Tr. at 93-94. She testified that the keloid was really itchy and painful if anyone touched it. Tr. at 94, 96-97.

Dr. Atkenson suggested using a silicone sheet to help the scar improve or to see a plastic surgeon. Tr. at 94. Petitioner never saw a plastic surgeon about the scar, but did have Silastic sheets applied by Dr. Atkenson. Tr.

at 95-96. Petitioner testified that she did not choose to undergo plastic surgery because there was no guarantee it fixed the keloid. Tr. at 119-120.

Section 12 Examination of Right Upper Extremity – Dr. Phillips

On August 10, 2009, Petitioner submitted to an independent medical examination with Dr. Phillips at Respondent's request. RX8; Tr. at 90. Petitioner provided a history and reported difficulty sleeping on her right side at night, occasional numbness and tingling in her some, index, and long fingers on the right side, pain in the palm which reduced in frequency, some paracervical and scapular discomfort only in physical therapy, no pain for the most part in pain at a level of 3/10 with physical therapy which she described as aching in nature, exacerbated pain with exercise and therapy, and no pain while at rest. *Id.*

Dr. Phillips released Petitioner to return to work with restrictions including no overhead lifting over 10 pounds. *Id.* He recommended continued physical therapy and opined that Petitioner should be able to return to work in approximately two months. *Id.* Dr. Phillips also noted that while Petitioner wished to return to work and he did not believe that Petitioner would have any permanent impairment, pain, or weakness in the right shoulder, he did not believe that Petitioner would be able to load or unload 500 to 1200 packages in an hour or assist in moving packages weighing up to 150 pounds. *Id.*

Regarding causality, Dr. Phillips opined that Petitioner's AC joint separation could not have been caused by overhead work or repetitive activities and he noted Petitioner's denial of any acute injury to her right shoulder. *Id.* He also noted his belief that Petitioner had underlying AC joint pathology and that Petitioner's overhead or repetitive activities might have caused symptomatology, but that Petitioner's medical records revealed no work-related source of Petitioner's condition as follows:

> When she was evaluated by Dr. Gorovitz [sic] on the day of her alleged injury (November 1, 2007), she displayed no evidence of acute injury (swelling, bruising, echymosis [sic]) with full motion in her shoulder. This is certainly not in keeping with an acute ac dislocation or ligament tear. Additionally, outside x-rays reviewed by Dr Atkenson on 11/12/2007, were documented as being unremarkable. MRI of her right shoulder performed on 11/26/27, showed no evidence of acute tears or trauma (no effusion, hemarthrosis, bone bruises etc) with mild degenerative changes in the AC joint, down-sloping acromion with secondary changes in the cuff. When she returned on 8/30/2008, her pain was described as being anterior, which is atypical for ac joint pain, strain or ligament injury, possibly due to biceps tendinitis (as seen on initial MRI). Pain from the ac joint is felt on the superior aspect of the shoulder. She subsequently developed impingement syndrome due to her down-sloping acromion and ac degeneration with resultant inflammation, which impinged on her cuff tendons.

Id. After providing an extensive description of the anatomy of the shoulder, Dr. Phillips ultimately opined that Petitioner's AC joint arthritis mentioned in the MRI report was not caused by Petitioner's work. *Id.*

In an addendum report dated August 21, 2009, Dr. Phillips further opined on Petitioner's right upper extremity and hand condition as a result of the alleged November 1, 2007 accident. *Id.* He diagnosed Petitioner with a dorsal ganglion cyst and possible early carpal tunnel syndrome which, absent Petitioner's shoulder issues, would not prevent Petitioner from working full duty. *Id.* Dr. Phillips ultimately opined that Petitioner's hand symptoms were not work-related. *Id.*

July 12, 2010 – Right Shoulder

Petitioner testified that she was working the same job for Respondent on July 12, 2010. Tr. at 58. She testified that her arm started hurting again while she was loading at work. Tr. at 58-59, 98-99. Petitioner testified that she reported this to her supervisors who told her to go to see her doctor. Tr. at 59. Petitioner also testified that she went to see Dr. Atkenson who placed her on restrictions, administered another steroid injection, and ordered physical therapy. Tr. at 59, 63, 100-101.

The records reflect that, on August 30, 2010, Dr. Atkenson ordered additional physical therapy related to Petitioner's right shoulder. PX5 at 163. Petitioner underwent physical therapy beginning on August 9, 2010 and was discharged on September 28, 2010. PX5 at 255-256. Petitioner testified that she had an MRI on August 25, 2010. Tr. at 101.

Petitioner also testified that she was placed on light duty and that Respondent placed her in the TAW classroom for 29 working days. Tr. at 59-60, 101-102. However, Petitioner testified that this time was different and Respondent sent her out to the small sort area to do what was supposed to be light duty work. Tr. at 60. Petitioner testified she was supposed to take bag filled with other bags that come down a slide into bin and place those bags into a big box. Tr. at 60-61. Petitioner estimated that these bags weighed up to 50 pounds. Tr. at 60-61.

Petitioner testified that she was taken off work effective September 10, 2010 until October 21, 2010. Tr. at 62. Petitioner received temporary total disability benefits beginning in September of 2010. Tr. at 103-104.

The Arbitrator notes that corroborating medical records were not submitted into evidence, but some of the aforementioned medical treatment related to Petitioner's claimed July of 2010 injury is referenced in Dr. Phillips' October 18, 2010 independent medical evaluation report. RX9.

Section 12 Examination of Right Upper Extremity – Dr. Phillips

On October 18, 2010, Petitioner submitted to an independent medical examination with Dr. Phillips at Respondent's request. RX9; Tr. at 106. Petitioner reported no significant change since her last evaluation with Dr. Phillips in August of 2009. *Id.* Dr. Phillips reviewed various records including, but not limited to, the following: (1) records from a Dr. Garcia; (2) an August 27, 2010 MRI; (3) an August 18, 2009 EMG; (4) records from Dr. Atkenson; (5) various physical therapy records; and (6) Dr. Verma's February 9, 2009 independent medical evaluation report. *Id.*

With regard to Petitioner's 2010 medical treatment, Dr. Phillips noted the following:

- On January 25, 2010, Petitioner presented to Dr. Atkenson with complaints of intermittent activity related pain overlying her AC joint. Her primary complaint, however, was related to itching. Petitioner was diagnosed with a prominent keloid scar overlying the right shoulder. Dr. Atkenson recommended Silastic sheeting and scheduled a follow up in one month.
- On July 15, 2010, Petitioner went to the Clearing Clinic. She reported that she re-injured her right shoulder while lifting a box on Monday[3] resulting in immediate pain onset, inability to

[3] The Arbitrator takes judicial notice of the 2010 calendar and notes that the Monday before July 15, 2010 was July 12, 2010.

complete a full work day the following day, and an injury to her finger on Wednesday[4]. Petitioner's right shoulder examination was remarkable for spasm with range of motion and a positive impingement sign. Petitioner was tender to palpation at the keloid scar overlying her AC joint. Plain films of Petitioner's right shoulder showed post acromioplasty and distal clavicle resection changes. Petitioner was diagnosed with a strain of her right rotator cuff and symptomatic keloid scar. Physical therapy was prescribed for her shoulder and she was told to see a plastic surgeon for scar revision of the keloid. She was restricted to no lifting over 15 pounds.

- On August 16, 2010, Petitioner saw Dr. Atkenson. She complained of an episode of intense pain two weeks prior awakening her from sleep and reported right shoulder pain radiating to both her neck and under her arm. On examination, Petitioner was tender to palpation at the keloid scar overlying her AC joint and full active assisted range of motion. Dr. Atkenson maintained his diagnoses and ordered a shoulder MRI.
- On August 30, 2010, Dr. Atkenson reviewed Petitioner's August 27, 2010 MRI showing findings consistent with edema-like changes in the AC joint. Petitioner's right shoulder examination was remarkable for spasm with range of motion and a positive impingement sign, tenderness to palpation at the keloid scar overlying her AC joint, and full active assisted range of motion. Dr. Atkenson administered an injection into the right AC joint, prescribed Voltaren and Lidocaine patches, ordered continued physical therapy and kept Petitioner on light duty work restrictions.
- On September 30, 2010, Petitioner returned to Dr. Atkenson complaining of pain in the vicinity of the keloid scar and at the end of her distal clavicle, and numbness in her right upper extremity. A prominent keloid scar was present overlying the AC joint. Again, Petitioner's right shoulder examination was remarkable for full active range of motion, a positive impingement sign, and tenderness to palpation at the keloid scar and at the distal clavicle on the right. Dr. Atkenson again recommended she see a plastic surgeon for scar revision and she was placed off work.
- On October 18, 2010, Ms. Bailey had a second independent medical evaluation conducted at the Illinois Bone & Joint Institute. Craig Phillips, M.D., conducted the evaluation and noted that Ms. Bailey can return to normal activities at work with regard to her right upper extremity. Dr. Phillips did not believe any further treatment and/or diagnostic tests were necessary. Dr. Phillips believed that Ms. Bailey had reached maximum medical improvement.

RX9. Ultimately, Dr. Phillips opined that Petitioner could return to her normal work activities with regard to her right upper extremity, no further treatment was necessary, and that Petitioner reached maximum medical improvement after her June of 2009 right shoulder surgery and July of 2010 injury. *Id.*

Continued Medical Treatment

Petitioner testified that she returned to work on October 22, 2010 without restrictions. Tr. at 63. At this time, Petitioner testified that she still had a lot of pain, she took medication for pain, and her pain was no longer "doable." Tr. at 63-64. Petitioner described "doable" pain as that which she could still manage while working without medication. Tr. at 64.

On November 13, 2010, Petitioner testified that she obtained a second opinion from Dr. Silver. Tr. at 106-107. The Arbitrator notes that no records from Dr. Silver were submitted into evidence.

[4] The Arbitrator takes judicial notice of the 2010 calendar and notes that the Wednesday before July 15, 2010 was July 14, 2010.

February 25, 2011 – Right Elbow

Petitioner testified that she returned to Dr. Atkenson in February of 2011 for treatment of a right forearm incident and that she occasionally had treatment to her shoulder, but the primary focus was the forearm. Tr. at 108. The Arbitrator notes that the subject of this accident at work is addressed in the Arbitrator's decision in Petitioner's Case No. 11 WC 30158.

Section 12 Examination of Right Shoulder and Right Elbow – Dr. Nicholson

On September 20, 2011, Petitioner submitted to an independent medical evaluation with Dr. Nicholson for the right shoulder and elbow. PX2 at 3-5; RX4. Petitioner localized pain in the shoulder near the keloid scar anterior to the distal clavicle. *Id.* During examination of the right shoulder, Petitioner had pain at the terminal extent of motion, pain to palpation over the shaft clavicle, pain to palpation over the mid shaft of the spine of the scapula over the posterolateral border of the acromion and globally throughout the shoulder. *Id.*

Dr. Nicholson diagnosed Petitioner with right shoulder pain of non-anatomic origin and right elbow pain of non-anatomic origin, more of a soft tissue myofascial pain that would be the primary diagnosis. *Id.* He found no evidence of a multiple crush injury to the right side with signs of thoracic outlet syndrome. *Id.* Dr. Nicholson further opined that Petitioner did not require any further medical treatment for the right shoulder or elbow. *Id.* He recommended a functional capacity evaluation, indicated that Petitioner was at maximum medical improvement absent a functional capacity evaluation, and indicated that Petitioner would not be able to return to her regular job duties. *Id.*

Additional Information

On November 11, 2011, Petitioner underwent a functional capacity evaluation at Dr. Atkenson's referral. RX5. The evaluator determined that Petitioner was physically capable of performing all of the essential duties of her job. *Id.*

On November 17, 2011, Petitioner returned to Dr. Atkenson. RX10. On examination, Petitioner's right shoulder showed full active range of motion with a +1 impingement sign, no demonstrable instability, a prominent keloid scar overlying the acromioclavicular joint, minimal tenderness to palpation at the lateral epicondyle origin of the forearm musculature, and no instability or loss of motion. *Id.* Dr. Atkenson noted that Petitioner had recently completed a functional capacity evaluation showing that she was capable of performing all of her duties at work. *Id.* He released Petitioner back to work without restrictions. *Id.*

Regarding her current right shoulder condition, Petitioner testified that she cannot reach out quickly with her right arm anymore, she has difficulty sweeping the floor, she can no longer do her hair because it bothers her to have her right arm up for long periods of time, she has difficulty driving/making circular motions while driving, and she constantly has to stretch her right arm and change positions. Tr. at 57-58, 65-66. She further testified that her shoulder still hurts today and that the pain is more severe than it was before her July 12, 2010 injury. Tr. at 74-75. Also, she testified that she still takes medication for the pain and she cannot place anything on the keloid/surgery scar on her shoulder. Tr. at 75. Petitioner further testified that if she wears a rear hook bra, she usually straps it in the front and twist it around although she sometimes feels a sharp pain in her right shoulder when doing so, and she now wears a sports bra because there is no strap on her keloid. Tr. at 115-118, 121-126. Petitioner also testified that, while she can reach above her head to place certain clothing on, she has difficulty getting tops off. Tr. at 126-107.

Regarding her current right elbow condition, Petitioner testified that her elbow was fine when she came back to work and she only has a little bit of trouble with it today; every so often it will stick in place and she has to shake her elbow out and extend her arm. Tr. at 138.

ISSUES AND CONCLUSIONS

The Arbitrator hereby incorporates by reference the Findings of Fact delineated above and the Arbitrator's and parties' exhibits are made a part of the Commission's file. After reviewing the evidence and due deliberation, the Arbitrator finds on the issues presented at trial as follows:

In support of the Arbitrator's decision relating to Issue (F), whether the Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds the following:

The Arbitrator finds that Petitioner's claimed right shoulder condition of ill being is related to the undisputed work accidents sustained on November 1, 2007 and on July 12, 2010. In so finding, the Arbitrator notes the overall consistency of Petitioner's testimony with the medical records submitted into evidence, the causal connection notations made by Petitioner's treating physicians, the Clearing Clinic physicians, and Respondent's Section 12 examiner, Dr. Verma, relating Petitioner's right shoulder condition with the original injury. While the Arbitrator notes that Petitioner submitted to two more independent medical evaluations with Dr. Phillips and Dr. Nicholson regarding the right shoulder, the Arbitrator is not persuaded by these opinions in light of the record as a whole which reveals an acute injury occurring on November 1, 2007 followed by relatively consistent right shoulder treatment and continued symptomatology that was exacerbated at work on July 12, 2010. Thus, the Arbitrator finds that Petitioner's claimed right shoulder condition of ill being is related to the undisputed accidents sustained on November 1, 2007 and July 12, 2010.

In support of the Arbitrator's decision relating to Issue (K), Petitioner's entitlement to TTD benefits, the Arbitrator finds the following:

The only temporary total disability period in dispute is from May 5, 2009 through May 26, 2009. *See* AX2. While Petitioner testified that she was off work during this period of time, there is no medical evidence that Petitioner was restricted from performing her job duties during this period of time. Thus, these requested temporary total disability benefits are denied.

In support of the Arbitrator's decision relating to Issue (L), the nature and extent of Petitioner's injury, the Arbitrator finds the following:

The Arbitrator notes that the evidence presented at the consolidated hearing in these matters was insufficient to "delineate and apportion the nature and extent of permanency attributable to each accident." *See City of Chicago v. Illinois Workers' Compensation Comm'n*, 409 Ill. App. 3d 258, 265 (1st App. Ct. Dist. 2011). As such, the permanency award in this case encompasses and compensates Petitioner for her injuries alleged in both of the above-captioned claims and no separate award is being made. *See Baumgardner v. Illinois Workers' Compensation Comm'n*, 409 Ill. App. 3d 274, 279-80 (1st App. Ct. Dist. 2011) ("From a procedural and practical standpoint, where a claimant has sustained to separate and distinct injuries to the same body part in the claims are consolidated for hearing and decision, it is proper for the commission to consider all of the evidence presented to determine the nature and extent of his permanent disability as of the date of the hearing.") Based

on the record as a whole, the Arbitrator finds that Petitioner has established permanent partial disability to the extent of 12.5% loss of use of the person as a whole pursuant to Section 8(d)(2)[5] for her right shoulder injuries.

[5] The Arbitrator awards permanent partial disability benefits in this case involving an injury to Petitioner's shoulder in light of the Appellate Court's holding in *Will County Forest Preserve District v. Illinois Workers' Compensation Commission*, 2012 Ill.App. LEXIS 109 (February 17, 2012).